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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, Copartners trading as ADAMS & KITCHEN, et al., *Petitioners,*

vs.

ANDREW W. MELLON, Director General of Railroads, and UNION STOCK YARD & TRANSIT COMPANY, *Respondents.*

BRIEF OF RESPONDENT DIRECTOR GENERAL OF RAILROADS ON THE MERITS.

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BRIEF OF RESPONDENT DIRECTOR GENERAL OF RAILROADS ON THE MERITS.

STATEMENT OF THE CASE.

Petitioners' statement of facts omits many essential facts and is, in some respects, misleading and erroneous. We believe the Court will be aided by a complete statement of the material facts rather than attempting to dovetail into petitioners' statement of facts, omitted facts and corrections of errors therein. We accordingly adopt such course. For brevity and convenience, respondents will be referred to herein as "Director General" and "Yard Company," respectively.

The Yard Company was created by special Act of the Legislature of Illinois, approved February 13, 1865, and was

empowered to construct necessary buildings, railroad tracks, loading and unloading platforms, for the accommodation of the business of a general Union Stock Yards, and to construct, maintain and operate a railway for its yards to connect with the tracks of all railroads terminating in Chicago. (R. 123-124). The shares in the Yard Company were owned by the railroads terminating in Chicago until 1894, at which time the railroads divested themselves thereof. During such period no charges were made for the use of the tracks in reaching the yards with trains of the line-haul carriers. After the line-haul carriers disposed of their shares, the Yard Company made a trackage charge against the railroads for use of its tracks, which was assessed upon a per car basis in the sum of 75c per car each way, loaded in and empty out. (Defendant's Exhibit 6, pages 475-6, not printed in the record, but original certified to this Court).

Subsequent to the assessment of such charge, the line-haul carriers continued to receive and deliver shipments of livestock in carloads at the Stock Yards, transporting them with their own locomotives and crews, and continued to absorb the loading and unloading charges, and soon after the assessment of such trackage charge, published their tariffs containing a terminal charge of $2.00 per car for the service of moving cars between the Stock Yards and points on their lines. This increased the total rate for transporting livestock between points of origin and the Stock Yards $2.00 per car. This $2.00 charge was assailed by the shippers and was held unreasonable by the Interstate Commerce Commission, but the Commission's conclusion was overruled and the charge upheld in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320 (R. 124-125).

A full history of the organization and development of the Yard Company up to 1894 is contained in the opinion of the Court in that case. The Yard Company from the beginning performed the service of loading and unloading all livestock

at the yards and in 1867 established a charge of 50c per car for loading and 25c per car for unloading, which charge continued in effect until May 21, 1917. (R. 122-124).

In 1897 the Yard Company leased all of its railroad property to the Chicago Junction Railway Company, (hereinafter referred to as "Junction Company") for a period of fifty years in consideration of a share of the net profits, the Yard Company retaining to itself the loading and unloading platforms and yards which it continued to operate, and the Junction Company thereafter operated the railroad property. (R. 124). In 1911 an action was brought by the Interstate Commerce Commission in the Commerce Court to compel the Yard Company and the Junction Company to file tariffs with the Interstate Commerce Commission covering their charges, in conformity with Section 6 of the Act to Regulate Commerce. The case went to the Supreme Court of the United States, where the contention of the Commission was upheld in 226 U. S. 286, and the Junction Company and the Yard Company were each held to be a common carrier and required to file tariffs with the Commission. (R. 125-126). In compliance with such decision, the Yard Company filed its tariffs with the Commission showing its charges for loading and unloading livestock. (R. 127).

The decision of the Supreme Court was rendered December 9, 1912. The tariff of the Yard Company was filed with the Commission May 1, 1913, and certified copy thereof is attached to Exhibit 1 to Defendant's Exhibit 1, a stipulation of facts signed by the parties, with various exhibits thereto, the stipulation being printed in the record, but the exhibits with the original stipulation (Defendant's Exhibit 1), certified to this Court and now a part of the record herein. (R. 233, Paragraphs 1 and 2).

Subsequent to the filing of its tariff by the Yard Company, the lease with the Junction Company was cancelled and a new lease entered into, pursuant to which the Yard Com-

pany received a fixed rental for its property instead of a share of the net profits. The line-haul carriers filed tariffs covering their terminal charges, which included a provision that the line-haul carriers would absorb charges of the Yard Company in the sum of 50c for loading and 25c for unloading each car of live stock received from or transported to the yards. This is known as the Lowery Tariff, which covered terminal charges in the Chicago District, including switching charges and various other terminal charges. (R. 223-225 and Exhibit 2 to Defendant's Exhibit 1).

The language of the absorption tariff in reference to the loading and unloading charge is:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car
50	25 "

By tariffs filed with the Interstate Commerce Commission effective May 21, 1917, the Yard Company increased its loading and unloading charges 25c per car, making its charges for such services thereafter 75c per car for loading and 50c per car for unloading. The line-haul carriers refused to pay the increased charges and did not amend their tariffs, but continued their absorptions under tariffs theretofore in effect and continued in effect. (R. 122-123).

The line-haul carriers were not a party to the Yard Company's tariff and did not authorize or consent to the filing thereof. On the title page of such tariff, however, is the following:

> "The charge made by this company for the service (as a carrier's agent) of loading and unloading livestock at the Union Stock Yards at Chicago, Illinois, is as follows, etc."

Then follows the charge of 50c per car for unloading and 75c per car for loading. The tariff originally filed in obedience to the decisions of the Supreme Court of the United States did not contain in parentheses or otherwise, the words "as a carrier's agent," or any other words of agency. The language of that tariff was:

> "The charge made by this company for the service of loading and unloading livestock is as follows: For loading, 50c per car of any capacity; for unloading, 25c per car of any capacity."

See first sheet of Exhibit 1 to Defendant's Exhibit 1.

The Yard Company had no authority from the line-haul carriers to file said tariff as their agent or otherwise. (Testimony Henkle, General Manager Yard Company, Defendant's Exhibit 6, page 344, original certified to this Court). Nor was such tariff filed at instance of the line-haul carriers. (Testimony Chace, Auditor Yard Company, Defendant's Exhibit 6, page 372; testimony Byers, Freight Traffic Manager, C. & N. W. Railway Co., Defendant's Exhibit 7, page 1260, original certified to this Court).

The files of the Interstate Commerce Commission show no authority for the statement "as carrier's agent." (Testimony Gohegan, Defendant's Exhibit 11, page 1242, original certified to this Court).

The Yard Company attempted to force the line-haul carriers to absorb the additional charge, but they refused to do so. The Yard Company had for many years been collecting the freight charges of the line-haul carriers and for a time withheld the additional charge out of the freight charges of the carriers collected by it. The line-haul carriers, to avoid

such practice, were preparing to collect their own charges, when an arrangement was reached by which in making out the freight bill, the additional 25c was added thereto, the bill reciting that it was assessed under the Yard Company's tariff for its charge in addition to that covered by the line-haul carriers' absorptions. (Defendant's Exhibit 6, 490-497). As thus prepared, the increased charge of 25c was collected by the Yard Company from the commission men, who were the consignees of the shipments. (R. 122-123).

It is usual for the terminal carrier to collect the charges of the line-haul carrier. For such service no compensation is received. The Stock Yard Company had for many years collected the charges of the line-haul carriers, pursuant to such practice and in consideration of prompt release of the live stock without surrender of bill of lading and without payment of charges,—guaranteed such charges. Without such prompt release, its live stock market could not be successfully operated. (Defendant's Exhibit 6, pages 498 and 499).

The understanding between the Yard Company and the line-haul carriers with reference to placing the additional charge of the Yard Company on the expense bills, was in keeping with the custom and practice in the Chicago District for line-haul carriers in making out their bills to show thereon the charges of the terminal or switching carrier, notwithstanding the terminal carriers' service was performed subsequent to that of the line-haul carriers. Such practice was based upon the advantage of having the total charge against the consignee presented and collected in one bill. (Defendant's Exhibit 6, pages 538 and 539).

Prior to the increase in the Yard Company's charges there was no amount to be collected from the consignee on account of the Yard Company's service, since the absorption tariffs of the line haul carriers covered its entire charge. The practice of including the Yard Company's charges in the

expense bill, while new as to that company, was not new in the district, and in placing same in the bill, there was no departure from established practice in such cases.

In the preparation of the bill thus collected by the Yard Company, the commission men, the Yard Company and the railroad collaborated. Method of preparation is described by Witness Mosier, Vice President, Live Stock Exchange, in Defendant's Exhibit 8, pages 121-123; Witness Park, Traffic Manager of the Live Stock Exchange, Defendant's Exhibit 8, pages 97, 98 and 122, and by Kemp, Joint Agent of the line-haul carriers, Defendant's Exhibit 11, pages 1218-1220. They agree and show the method substantially as follows:

The waybills covering individual cars are delivered to representatives of the Yard Company at unloading chutes by road haul carriers and while cars are being unloaded by employees of the Yard Company, other employees of the Yard Company are preparing bulletins announcing arrival. Contents of cars are delivered to consignees so notified by Yard Company's representatives. The waybills are accompanied by a sheet showing the counts of consignments and are delivered to the joint railroad office by a representative of Yard Company, where the rates are revised, the counts passed on to a live stock stub and the live stock stub extended at the proper rate is delivered to commission firm or consignee extended at the minimum weight, the actual weight not being in possession of the carrier. The commission firm inserts the actual weight, less tariff shrinkage allowance, extends the excess over the minimum, if any, and returns the live stock stub to the railroad office for further verification. If figures are found erroneous, stub is returned to commission firm for further handling. If extensions are found correct, waybill is corrected in accordance with the information shown on the stub, the waybill being reported to the interstate carrier's auditor and the live stock stub sent to Auditor of the Yard Company for collection of the freight

charges. Collections are made by Yard Company twice a week. After making the collection, Yard Company pays same over to railroad office every Wednesday morning, covering all collections during previous week.

Line-haul rates for transporting live stock were predicated on carload shipments being loaded and unloaded by the shippers. (Defendant's Exhibit 6, page 459).

The tariffs of the line-haul carriers were not offered in evidence except the Lowery Tariff covering terminal charges including the absorptions the line-haul carriers would make for switching, loading and unloading livestock and other services of connecting carriers. (Exhibit 2 to Defendant's Exhibit 1).

Tariff Provisions Requiring Shippers to Load and Unload Livestock.

Official Classification No. 44 effective prior to, at the time and subsequent to the increase in loading and unloading charges by the Yard Company contained the rules, general regulations, terms and conditions of transportation and form of Uniform Live Stock Contract applicable to line-haul carriers east of Chicago. Title page, pages showing participating carriers and also pages 30, 48, 49, 220, 221, 223 and 224 of such Official Classification, duly certified, attached to Defendant's Exhibit 1 as a part of Exhibit 3 thereto; also portions of Supplements Nos. 20 and 29 thereto, were offered in evidence.

This classification with supplements issued by the Director General continued in effect during Federal control. (R. 296-297).

In Official Classification No. 44 under head of "Rules and Special Instructions" is the following:

"Unless otherwise provided, when property is transported subject to the provisions of the Official Classification, the acceptance and use are required, respectively, of the Uniform Bill of Lading "straight" or "order" (pages 41-44 inclusive), export bill of lading (pages 45-47 inclusive), Uniform Livestock Contract (pages 48 and 49) * * *"

The form of Uniform Live Stock Contract referred to on pages 48 and 49 contains in Section 5 of Conditions thereto the following:

"The shipper at his own risk and expense shall load and unload said livestock, and in case any person shall accompany said livestock in charge of the same, take care of, feed and water said livestock while being transported."

Such contract further provides that the livestock is received subject to the classifications and tariffs in effect, and that the carrier,

"agrees to convey to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination."

Rule 8 thereof on page 223 provides:

"The consignor and consignee are responsible for loading and unloading the same, the carrier assuming no liability whatever in regard to loading and unloading." (Exhibit 3 to Defendant's Exhibit 1).

Western Classification No. 54 applicable at the time to the western roads as continued in effect through Western Classification No. 55 and Supplement No. 1 thereto issued by the Director General, (R. 297-298), provides on page 249:

"It should be understood, in receiving livestock of any description for transportation that the actual delivery does not commence until the stock has been placed in the car and the responsibility of the railroad company

shall cease upon the delivery of the car at the station to which consigned, the consignor and consignee to load and unload the same."

Rule 22, Western Classification No. 55 on page 13, provides:

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers carried at carload ratings."

On page 282 of said Classification it is provided:

"It should be understood, in receiving live stock of any description for transportation, that the actual delivery does not commence until the stock has been placed in the car, and the responsibility of the railroad company shall cease upon the delivery of car at station to which consigned, the consignor and consignee to load and unload the same."

Such provision is contained on page 21 of Supplement No. 1 to Western Classification No. 55. Western Classifications Nos. 54 and 55 and Supplement No. 1 thereto are offered in evidence as Exhibit 5 to Defendant's Exhibit 1, original certified to this Court. (R. 297-298).

Consolidated Freight Classification No. 1 issued by the Director General includes all railroads under Federal control and takes the place of Official Classification, Western Classification and Southern Classification, and contains the rules, general regulations, form of contract, terms and conditions governing transportation on all railroads under Federal control, including all involved in this suit subsequent to the issue thereof. Copies of title page, pages showing participating carriers, pages 47, 48, 246 and 250 are attached to Defendant's Exhibit 1 as Exhibit 6 thereto, duly certified and were offered in evidence. (R. 298-299).

On pages 47 and 48 is set out the Uniform Live Stock Con-

tract containing the provisions theretofore contained in the Uniform Live Stock Contract, a part of the Official Classification and hereinbefore quoted.

Intrastate shipments in Illinois were governed by Illinois Classification, appropriate portions thereof attached to Exhibit 7 to Defendant's Exhibit 1. (R. 299). Such Classification on page 5, Paragraph B, provides:

> "Consignors and consignees will be required to load and unload all freight upon which carload ratings are applied."

Defendant's Exhibit 1, paragraph 44, (R. 240) provides:

> "All shipments of live stock involved in this suit consisted of carloads moved on carload ratings as ordinary live stock."

Witness Byers, Freight Traffic Manager, Chicago & North Western Railway Co., testified that classifications and tariffs of the carriers provide that it is the duty of the shipper to load and unload live stock and that such had been tariff provisions for as long as he could remember. (Defendant's Exhibit 6, pages 455 and 456).

Witness Mosier, Vice President and Chairman, Transportation Committee, Chicago Live Stock Exchange and a commission merchant of long experience, testified he was familiar with the live stock shipping contract long in use by the railroads covering transportation of live stock and that such contract continuously provided that the shipper must load and unload his stock. (Defendant's Exhibit 6, page 150).

I. & S. Docket 1118 and I. C. C. No. 9977.

On July 17, 1917, the Yard Company issued a supplement to its tariff which had increased its loading and unloading charges by which the Yard Company sought to cancel its

charges as a tariff matter, on the theory that it was no longer subject to the Act to Regulate Commerce, and was not require to file tariffs of its charges with the Commission. The Commission suspended such supplement and set the matter down for hearing under I. and S. Docket No. 1118 and thereafter extended such suspension order from time to time, thus keeping the tariff covering the Yard Company's charges in effect.

On November 17, 1917, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission, which was docketed as I. C. C. No. 9977 and was offered in evidence as Defendant's Exhibit 2. (R. 243-256). This was before Federal control and the railroad companies and the Yard Company were sole defendants. No shipper or commission merchant and no plaintiff in this suit was named in such complaint. Complaint was made therein that the 25c increase in the Yard Company's tariff and collection thereof from the shippers was a violation of Sections 1 and 3 of the Act to Regulate Commerce, I. & S. Docket 1118 and I. C. No. 9977 were consolidated, testimony was taken and on February 11, 1919, the Commission rendered its opinion reported in 52 I. C. C. 209 dismissing the complaint.

The opinion is in evidence as plaintiff's Exhibit 1. (R. 121-141). In that proceeding the Yard Company insisted that by reason of the change in the form of its lease to the Junction Company, it was no longer a common carrier and therefore not required to publish and maintain tariffs of its charges, but the Commission, after full consideration, denied such contention, saying:

> "The inevitable conclusion is that the Stock Yard Company is now, as to shipments of live stock to and from the Stock Yards, a common carrier engaged in interstate commerce, and subject to the provisions of the Interstate Commerce Act." (R. 129).

The Commission also, after reviewing its former decisions on the subject and the decisions of the courts, held that the duty to load and unload live stock was a duty of the shipper, and since no question as to reasonableness of the rate charged was presented, dismissed the complaint and closed the investigation. In concluding its opinion, the Commission said:

> "The soundness of the view that ordinarily it is the duty of the shipper to load and unload carload freight cannot be questioned. What is there, then, respecting shipments of live stock in carloads that differentiates such shipments from that of other articles so clearly as to shift the responsibility and duty of loading and unloading from the shipper to the carrier?" (R. 131).

After discussing the reasons urged in behalf of the shippers, the Commission said:

> "They disregard the facts that the stock yard company is made a common carrier by the terms of its charter; that it has been held to be such by the Supreme Court of the United States; that its facilities for loading and unloading live stock are not on the rails of the line-haul carriers; and that these facilities are reached by the rails of the Chicago Junction Railway." (R. 136).

The Commission also said:

> "From the facts of record it is clear that the stock yard company is a common carrier within the meaning of section 1 of the act. It is performing services in connection with the receipt and delivery of interstate shipments. As above stated, the stock yard company was held to be a common carrier by the Supreme Court, and there has been practically no change in its status since that decision was rendered." (R. 137).

In response to exceptions filed to the report of the Examiner, the Commission further said:

"It is contended that the service is for the carriers' benefit and not that of the shippers. It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so they are entitled to compensation therefor. In the absence of tariff provisions to the contrary this is a separate and distinct service not included in the transportation rate. We have held that for loading and unloading, and for all other special services apart from conveyance, the carriers may properly make a reasonable charge since they are not accessorial parts of the transportation which section 1 requires the carriers to furnish. Dunnage Allowances, 30 I. C. C. 538, 543." (R. 138).

In final conclusion the Commission said:

"Upon the facts of record we find that—

1. The Union Stock Yard & Transit Company of Chicago is a common carrier engaged in interstate commerce and subject to the provisions of the act to regulate commerce.

2. The notice of cancellation of its tariff of charges for loading and unloading live stock, in carloads, at the Chicago stock yards has not been justified.

3. The loading and unloading of live stock, in carloads, at the Chicago stock yards is a duty of the shipper." (R. 138-139).

The Stock Yards were not taken under Federal control. The Director General was not a party to the foregoing proceedings. (R. 139).

The order suspending the cancellation tariff of the Yard Company was allowed to lapse and the Commission on March 13, 1919, amended its order dismissing the complaint by requiring the Yard Company to file a supplement to its tariff restoring and continuing the tariff sought to be cancelled in effect *nunc pro tunc* as of December 31, 1918. (R. 237).

The Yard Company and Live Stock Exchange filed petitions for rehearing and on April 14, 1919, the proceeding was reopened and in the order so doing, the Director General of Railroads was named as a *Respondent*. (R. 237-238). Fur-

ther testimony was thereafter taken, no amendment being made to the complaint in respect to the Director General or otherwise. (R. 294-295). (Exhibits 8 and 9 to Defendant's Exhibit 1, certified copies of docket entries).

On February 28, 1920, the Transportation Act of 1920 was approved by the President and became effective. The Act contained an amendment to Section 15 of the Act to Regulate Commerce as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner." (49 U. S. C. A., Section 15, Paragraph 5).

This provision became effective at the end of Federal control March 1, 1920, and the railroad companies having been restored to the possession of their properties, amended their tariffs in compliance therewith and provided therein for absorbing the entire loading and unloading charge at the Union Stock Yards, Chicago. On July 15, 1920, the Commission rendered its opinion in said proceedings on rehearing, (58 I. C. C. 164) in which, without serious discussion, it adhered to its conclusion that the Yard Company was a common carrier and announced that it was in error in its former opinion in holding that the duty to load and unload live stock was that of the shipper. In that opinion the Commission said:

> "For the reasons stated we are of opinion that our finding that it is the duty of the shipper to load and unload live stock in the stock yards at Chicago was error, and it is therefore reversed. And we now find that it was the duty of the carriers to unload and load live stock at that point." (R. 144).

In reversing its conclusion the Commission does not mention the foregoing tariff provisions making it the duty of the shipper to load and unload live stock, but relies entirely on the fact that the absorption provision in the tariffs of the carriers had, prior to the increase in charges of the Yard Company, covered the entire loading and unloading charge at Chicago.

In such opinion the Commission said:

> "We adhere to our finding that the stockyard company is a common carrier engaged in interstate commerce. As the services of unloading and loading are part of the transportation of live stock the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock from and to interstate points to and from the stockyards was an unlawful and unreasonable practice." (R. 144-145).

No reparation order was entered in that proceeding.

I. C. C. 12614.

On February 25, 1921, the Chicago Live Stock Exchange filed a complaint with the Interstate Commerce Commission charging as a violation of the Act to Regulate Commerce, the collection of the 25c additional charge of the Yard Company. All of the railroad companies transporting live stock to the Stock Yards in Chicago, as well as the Director General of Railroads as Agent, were made defendants. (R. 238 and Defendant's Exhibit 3, R. 257-267). The plaintiffs in this suit are named therein as members of the Live Stock Exchange, but not directly as complainants. After setting forth the names of plaintiffs as commission merchants and members of the Exchange, the complaint alleges:

> "That said above named individuals, firms, copartnerships and corporations on their own behalf, as con-

signees of inbound shipments or as consignors of outbound shipments, or as factors or agents for the consignors of inbound shipments or as factors or agents for the consignees of outbound shipments, paid to defendants each and all of the charges complained of as unlawful."

Also:

"There is filed herewith and made a part hereof and marked Appendix A, a list which gives the names of individuals, copartnerships and corporations, the address of each of which is, care of Chicago Live Stock Exchange, Union Stock Yards, Chicago, Ill. This list includes the names of additional shippers not now included in the record, and also the names of shippers already filed of record, and also the names of shippers who made intrastate shipments during the period of Federal control, who, together with the parties named in paragraph II hereof (the commission men) paid and bore the unreasonable and unlawful charge of 25c per carload for loading and unloading live stock at the Union Stock Yards at Chicago." (R. 264).

Answers were filed by the various defendants and testimony was taken at various times. All of such testimony including that offered in I. & S. 1118 and I. C. C. No. 9977 is contained in Defendant's Exhibits 6, 7, 8, 9, 10 and 11, Stenographer's Transcripts offered in evidence and certified to this Court. (R. 269-271).

The method and course of dealing between the commission men and shippers is described by many witnesses and concerning which there is no dispute. The following is typical:

D. C. Mosier, Vice President, Chicago Live Stock Exchange and Chairman of its Transportation Committee, also a commission man, member of firm of Rosenbaum Bros. & Company, one of the plaintiffs, testified:

"When this stock is received at the yards by the Commission men, they pay all the charges, the yardage charges, the freight terminal charges, and remit to the shipper the net proceeds of the consignment." (Defendant's Exhibit 8, pages 30-31).

Witnesses were examined in behalf of each of the petitioners, there being more than one hundred witnesses. The following is typical:

L. F. Weeks of Bowles Live Stock Commission Company, testified:

"Q. To whom were the loading and unloading charges paid by your firm? To the line-haul carrier or to the stockyards company?

A. We paid the stockyards company." (Defendant's Exhibit 9, page 199).

He also testified that in every case the amount was charged to the shipper. (Defendant's Exhibit 9, pages 200 and 201).

William S. Burmister, a member of Martin Bros. & Co., testified:

"Q. To whom did you pay the charges? To the stockyards company or the line-haul carriers?

A. The checks were all made out to the Union Stock Yard & Transit Company.

Q. And all of the charges paid to that company?

A. Yes, sir.

Q. Now, did you, in making settlement with the shippers, charge them for the unloading charges?

A. Yes, sir. * * *

Q. Now, Mr. Burmister, is a uniform plan or uniform method of payment of charges followed by every commission firm?

A. Yes, sir." (Defendant's Exhibit 9, pages 207-209, 219 and 220).

Fred D. Gillogly of the firm of Gillogly & Co., testified:

"Q. For whom did you pay these charges?
A. Paid them for the owner and consignor.

* * * * * * * * *

Q. I mean by that you subsequently collected the amount that you paid here for loading and unloading from the owner of the stock, is that correct?
A. Well, we deduct all charges before we pay the principal anything." (Defendant's Exhibit 9, pages 271, 272 and 277).

Charles A. Wilson of W. W. Wilson & Co., plaintiff, testified:

"In every case where you paid this charge you collected the amount from the owner of the stock, didn't you?
A. Yes.

* * * * * * * * *

Q. You got the 25 cents, though, from the shipper?
A. We paid that with his own money, not with our money." (Defendant's Exhibit 9, pages 363 and 364).

Seth B. St. John of Brown-St. John Co., a plaintiff, testified:

"Q. And, as the matter now stands, your firm isn't out of pocket any money by reason of the payment of these unloading charges?
A. We are just simply deducting the total amount of the expense of the shipment and depositing to their credit the net amounts after all of this expense is taken out." (Defendant's Exhibit 11, page 953).

Authority for Collecting the Additional Charge.

C. C. Chace, Auditor of the Yard Company, testified:

"Q. Do you know under what authority the loading and unloading charges were collected or assessed?
A. On the authority of the Stock Yard's tariff." (Defendant's Exhibit 9, page 181).

Mr. O. T. Henkle, General Manager of the Yard Company; testified that if the Commission would permit the Yard Company to cancel its tariff containing the charge complained of, the Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342).

That the Commission regarded the tariff of the Yard Company as requiring the collection of the additional 25c from the shipper is shown by provision in the opinion of the Commission, which recites that for a time on some roads, the additional charge was not collected from the shipper, and permitted the cancellation of such uncollected charges. (Plaintiff's Exhibit 3, R. 156).

The 25c additional charge was placed in the expense bills because the tariff of the Yard Company required it to be collected. (Testimony Coffey, Defendant's Exhibit 6, page 681).

In the course of hearing at Chicago, March 13th to 16th, 1918, the complainant through its counsel, Mr. Barnes, refused to consent to the cancellation of the Yard Company's tariff and Mr. Cowan, counsel for the shippers at that time, stated that so long as tariff was in effect, the shipper would have to pay the increased charge. (Defendant's Exhibit 6, pages 106-107).

Theory of Petitioners.

In the course of the various hearings before the Commission, the theory of the sought-for awards was repeatedly stated by Mr. Clair R. Hillyer, attorney for the Chicago Live Stock Exchange and the commission men. At hearing on October 3, 1922, Mr. Hillyer stated:

> "The theory on which this is being tried is that these people are the factors and agents of these principals; that they have title to the property; that they can sell it in their names; they can sue and be sued for it in

connection with it; they are liable for all of these charges legally, and that they have every right to come in here and collect this money as factors in their own right." (Defendant's Exhibit 9, page 27).

On the same date Mr. Hillyer, in response to statement of counsel for the Yard Company, said:

"I had better correct your impression of that right of agency, Mr. Towner, because that is not the basis of our case at all. The basis of our case is that these people have a legal right to collect this money under the decisions of the Commissions and the courts, and that it is not necessary for them to disclose here what they are going to do with it after they get it."

Thereupon Mr. Towner inquired:

"Is it your theory for my information, that these complainants would have the legal right not only to recover reparation but to retain it?"

And Mr. Hillyer answered, "Yes." (Defendant's Exhibit 9, page 236).

Certain witnesses mentioned the giving of powers of attorney to the commission men to act for them in recovering the charges complained of. The testimony of George Moone, office manager of Petersen, Turnbull & Company, is illustrative:

"Q. At what time did this concern which you represent authorize the Chicago Live Stock Exchange to file this complaint?

A. Early in May 1917.

Q. And in what manner?

A. We got complaints from our shippers and we went and got powers of attorney from all of those fellows and turned them over to Mr. Park to go ahead and go along any way he found fit to collect this for our customers.

Q. You say you got powers of attorney?

A. Yes.
Q. From whom?
A. From our customers in the country.

* * * * * * * * *

Q. These papers that you denominate powers of attorney. Have you them present?
A. No, sir. I turned them over to Mr. Park.

* * * * * * * * *

Q. Are they filed in this record?
A. I don't know."

Whereupon Mr. Hillyer responded:

"No, they are not in the record and they are not going to be put in. We are not relying on them at all. They are just so much waste paper as far as this case is concerned." (Defendant's Exhibit 9, pages 316 and 317).

On the same date in the course of the proceedings, Mr. Hillyer further stated:

"It is my view that legally these shippers, commission men, entitled to collect this money and keep it if they want to, but we are volunteering the information to the Commission that they do not intend to do it and that they intend to pay it back to the people *who bore the charge* and that is the policy of the exchange to its customers and is the testimony of the witness Mosier, who is chairman of the Traffic Committee of the Exchange in his sworn testimony before the commission that he is going to pay it back. But that has nothing to do with the legal rights in the case." (Defendant's Exhibit 9, page 563).

The Yard Company was conducting on its premises the greatest live stock market in the world and the live stock were destined to such market for sale. They had to be moved from the receiving pens at the docks to sales pens of the respective commission men, consignees, before being sold. The sales pens were the final destination. Shipments

were billed to the Stock Yards and were required to pass over the rails of the Junction Company over which the line-haul carriers had trackage rights by paying a per car trackage charge in order to reach the docks of the Yard Company. To complete transportation, the stock must be unloaded and moved to the sales pens. This was the function and service of the Yard Company on account of which it had the rights and was burdened with the obligations of a common carrier.

The line-haul carriers had no right to go upon them and could not perform the physical act of loading or unloading thereat. (Defendant's Exhibit 6, pages 288-290).

The unloading docks, chutes and receiving pens were owned and maintained by the Yard Company as a necessary facility for delivering the live stock to the market it was maintaining. The market without such facilities was impossible. The railroad companies did not maintain yards for such stock on their own lines because if unloaded in their own pens, the stock would have to be driven to the Stock Yards in order to reach the market for sale, and since the purpose of the shipment was to sell the stock on the market, it had to be taken to the place where the market was maintained and it was necessary that the service of the common carrier maintaining and operating the facilities for reaching the market be utilized. (Testimony Witness Mosier, Defendant's Exhibit 6, pages 143-6; Defendant's Exhibit 7, page 1026).

The Commission rendered its opinion June 2, 1925, and same has been offered in evidence as plaintiff's Exhibit 3. (R. 147-157). In such opinion the Commission said:

> "Most of the reparation claimed is by the live stock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and rights as parties to the trans-

portation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the live stock shippers who were the consignors. While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation." R. 151).

Also:

"We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers, with interest from date of payment."

Following the foregoing all of the petitioners are named. (R. 151-156).

Following the opinion of the Commission is the following concurring opinion by Commissioner Hall:

"I join in the award of reparation to those complainants only as constrained thereto by the decision of the majority in *Missouri Portland Cement Co. v. Director General*, 88 I. C. C. 492, and am authorized by Commissioners Esch, Lewis and Cox, to say that their participation in the award is under the same constraint." (R. 156).

Following the rendering of such opinion, Rule V Statements were filed by petitioners, and pursuant thereto, the award sued on was entered on December 12, 1927. (R. 157-210). These statements were offered as Exhibit 1-A before the Commission at hearing October 3, 1922. (Defendant's Exhibit 9, page 44, and on the trial of this case as Defend-

ant's Exhibit 37. R. 283). They consist of many thousand sheets of paper furnishing tabulated information as to the various shipments, and are contained in a large box which has been certified to this Court. (R. 283; R. 410). Such award is in part as follows:

> "We find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest." (R. 158).

The petitioners are named as individuals and the awards are in part against the various railroad companies and in part against the Yard Company and the Director General as *Agent. No allowances are indicated in favor of any petitioners in a representative capacity.* The Yard Company and the Director General, denying the validity of the Commission's award, refused to pay the same and this suit was brought.

THE ISSUES.

Petitioners sued in their own behalf and not in a representative capacity, or for the benefit of anyone except themselves. In Paragraph 1 of their petition they allege:

> "1. The plaintiffs named in Paragraph 2 hereof bring this suit against Andrew W. Mellon, Director General of Railroads, as Agent, the Union Stock Yards and Transit Company as defendants * * * to recover as damages certain amounts hereinafter specifically designated *paid by the plaintiffs* to the defendants named * * *
>
> 2. The following named plaintiffs are and each of them is named in an order of the Interstate Commerce Commission, entered on the 12th day of December, 1927, as *being entitled to receive* from the defendants hereinafter named, the amounts respectively set forth in said order of the Commission, a copy of which is hereto

attached as Exhibit A and made a part hereof * * *. The following named are the plaintiffs herein *and are the parties entitled to receive the damages awarded by the Interstate Commerce Commission.*" (R. 4. Italics ours).

Then follows a complete list of the names of the petitioners herein. Various opinions and orders of the Commission are attached as exhibits with appropriate allegations to entitle petitioners to the *prima facie* effect thereof, and they rely very largely upon such *prima facie* effect, as provided in Section 16 of the Act to Regulate Commerce.

The prayer of the petition is:

"WHEREFORE, by reason of the premises, the defendants have become and are indebted to the plaintiffs in the said sum of One Hundred Forty Thousand, One Dollar and Twenty-five Cents ($140,001.25), and interest thereon * * * and the plaintiffs therefore pray judgment against the defendants, etc." (R. 18).

The Director General as Agent answered, (R. 30-45), challenging the validity of the award on various grounds, including the following:

The charges of the Yard Company were imposed by its tariffs filed with the Interstate Commerce Commission, pursuant to its duty as a common carrier engaged in interstate commerce, and were collected and retained by it; that as such common carrier, the Yard Company was required to file and enforce its tariff by collecting the charges imposed; that the charge was not imposed by any tariff, rule or regulation of the Director General and was not collected by him and he did not receive the money collected or benefit thereby; that the duty to load and unload live stock was that of the shipper and such loading and unloading was not covered by the tariffs or transportation furnished by the line-haul carriers; that the absorption tariffs of the line-haul carriers limited their contribution to the Yard Com-

pany's charges to the specific amounts named therein; that the collection of a separate charge for unloading by the Yard Company, pursuant to its published tariff, was not an unreasonable or unlawful practice; that the charges were not paid by plaintiffs in said suit; that such plaintiffs suffered no damage by the collection thereof and do not have such title or interest as will permit them to maintain the suit; that the stock yards were not the terminals of the line-haul carriers but were the property and facilities of an independent common carrier furnishing the portion of the transportation which included unloading and delivery to consignees; that the findings, reports and orders relied upon in support of the award sued on were without support in the evidence and were contrary to law; that the Interstate Commerce Commission was without jurisdiction to make an award against the Director General as Agent on account of the collection of the Yard Company's charges from the shippers.

THE TRIAL.

On the trial in the District Court, petitioners offered in evidence the various opinions and orders of the Commission and brief testimony of H. R. Parks, Traffic Manager, Live Stock Exchange, in reference to the manner of making up bills for collection of the charges, the payment of same, and in general, methods of operation of the Stock Yards and the conduct of the business of the Commission merchants, same being in harmony with the facts as hereinbefore stated in reference thereto. (R. 216-232).

Petitioners also offered in evidence Paragraphs 1 to 11, inclusive, and 26 to 46 inclusive, of Stipulation of Facts signed by the parties, certified in the original to this Court as Defendant's Exhibit 1. (R. 233-240 and 410).

The facts therein have already been set forth in this state-

ment. The defendants offered in evidence stenographic transcripts of all testimony taken before the Interstate Commerce Commission in I. & S. 1118 and I. C. C. Nos. 9977 and 12614, including all exhibits referred to therein, being all of the evidence before the Commission. Such stenographic transcripts are marked Defendant's Exhibits 5, 6, 7, 8, 9, 10 and 11. (R. 268-271). The exhibits offered at said hearings before the Commission and mentioned in Defendant's Exhibits 5 to 11 inclusive were marked Defendant's Exhibits 12 to 45, both inclusive. (R. 271-292). Defendant's Exhibits 5 to 45, both inclusive, have been certified to this Court.

Respondents also offered in evidence the stipulation signed by the parties, a portion of which was offered by petitioners, same being marked Defendant's Exhibit 1 and which, with the exhibits attached thereto, has been certified in the original to this Court. Paragraphs 1 to 11, inclusive, and 26 to 46, inclusive, not including the exhibits referred to therein and offered by petitioners, are found at pages 233 to 240 of the record, and Paragraphs 12 to 25 inclusive, included in the offer of the entire stipulation as Defendant's Exhibit 1, are found at pages 296 to 299 of the record. Respondents also offered in evidence as Defendant's Exhibits 2 and 3, copies of the complaints filed in I. C. C. Nos. 9977 and 12614, respectively. (R. 243-267). Also Defendant's Exhibit 4, a copy of the order of the Commission dated April 8, 1922, reopening the proceedings in I. C. C. No. 9977 and consolidating same with I. C. C. No. 12614 for hearing. (R. 267-268).

The Director General also offered testimony of Thomas H. Gillis, Assistant Secretary of the Commission and in charge of its records, to the effect that the dockets of the Commission contained no indication that Complaint No. 9977 was ever amended to state a complaint against the Director General or that any notice of that complaint or of the order of the Commission making the Director General re-

spondent in I. & S. 1118 or in I. C. C. No. 9977 was ever given the Director General, or that the Director General ever appeared in said proceeding. (R. 294-296).

The Stipulation of Facts (Defendant's Exhibit 1) with the exhibits thereto, includes many facts not shown in the evidence before the Interstate Commerce Commission. Respondents relied on such new evidence and also on the testimony taken before the Commission both as showing the facts on which their defense is based and showing lack of evidence before the Commission to support its findings and orders. The Trial Court had before it all of the evidence before the Commission, as well as the additional evidence offered by the parties on the trial. The essential facts in the evidence before the Commission, as well as the additional evidence offered on the trial in the lower Court, have already been stated herein.

At the conclusion of the testimony, respondents moved for a directed verdict in their favor and such motions were sustained. The motion of the Director General is set forth at pages 55 to 59 of the record. The written opinion of the Trial Court in sustaining such motions is found at pages 60 to 77 of the record. From a judgment entered upon the verdicts directed by the Court, the plaintiffs appealed to the Circuit Court of Appeals of the Seventh Circuit, which affirmed the judgment of the lower Court. The case has been brought here on petition for certiorari granted by this Court.

SUMMARY OF ARGUMENT.

I.

FUNDAMENTAL MISCONCEPTION OF PETITIONERS AS TO THE FACTS.

A. The Published Tariffs of the Line-Haul Carriers Covered Transportation to the Stock Yards, But Did Not Include Unloading the Stock.

Petitioners erroneously contend that the line-haul rate, plus the $2.00 terminal charge, included the unloading of the live stock. Such tariffs, as well as Uniform Live Stock Contract a part thereof, expressly precluded such duty. The absorption tariffs of the line-haul carriers provided for absorbing a certain amount in cents per car for loading and unloading. The $2.00 terminal charge was investigated by Commission and involved in *Interstate Commerce Commission vs. C. B. & Q. Railway Co.*, 186 U. S. 320. This charge was justified because of the trackage charge of the Junction Company and the amount then being absorbed of the loading and unloading charges of the Yard Company. The Yard Company was a common carrier and its charge was covered by its tariffs. When it increased its charges, the line-haul carriers refused to increase their absorptions.

B. The Yard Company was not the Agent of the Line-Haul Carriers in Performing Any Transportation Service or in Publishing and Enforcing its Tariffs.

United States vs. Union Stock Yards & Transit Co., 226 U. S. 286.

Act to Regulate Commerce, Section 6, Paragraph 4, (49 U. S. C. A. Section 6, Paragraph 4, page 281). (Appendix 131).

The Yard Company was a common carrier and required to file and maintain its tariffs. In its tariff increasing its charges, it recited in parentheses that its charges were "as a carrier's agent." The alleged agency was repudiated and did not exist, and the Commission so found. (R. 137).

C. No Matter of Administrative Discretion was Involved in the Decision of the Interstate Commerce Commission.

Great Northern Railway Company vs. Merchants Elevator Co., 259 U. S. 285-294.
United States Navigation Co. vs. Cunard S. S. Co., 52 Sup. Ct. Rep. 247-9.
Interstate Commerce Commission vs. C. B. & Q. R. R. Co., 186 U. S. 320.
Meeker vs. Lehigh Valley Railway Company, 236 U. S. 412.
Interstate Commerce Commission vs. Louisville & Nashville Railway Co., 227 U. S. 88-91-92.
Interstate Commerce Commission vs. Union Pacific R. R. Co., 222 U. S. 541-7.
Chicago, Rock Island & Pacific Railway Co. vs. United States, 274 U. S. 29-33.
Chicago Junction case, 264 U. S. 258-63.
Act to Regulate Commerce, Section 6, Paragraph 1: (49 U. S. C. A., Section 6, Paragraph 1, pages 240-241). (Appendix 130).

In its second opinion the Commission said:

"The facts in this case are not in dispute." (R. 144)

There was no question as to reasonableness of the Yard Company's charges or of the rates of the line-haul carriers. The Commission's finding was not based on discrimination. (R. 139). The tariffs were not complicated and no technical words were involved. A question of law was presented in the construction of them.

II.

THE EVIDENCE WAS INSUFFICIENT TO SHOW THE DUTY OF LOADING AND UNLOADING LIVE STOCK AT THE STOCK YARDS WAS THAT OF THE LINE-HAUL CARRIERS OR THAT THE LINE-HAUL CARRIERS SHOULD ASSUME THE EXPENSE THEREOF.

Act to Regulate Commerce, Sec. 1, Par. 6, (49 U. S. C. A., Sec. 1, Par. 6, Pg. 12). (Appendix 130).
Act to Regulate Commerce, Sec. 15, Par. 5, (49 U. S. C. A. Sec. 15, Par. 5, Pg. 426). (Appendix 132).
Act to Regulate Commerce, Sec. 20, Par. 11, (49 U. S. C. A. Sec. 20, Par. 11, Pgs. 87-88).

The Yard Company was a connecting terminal common carrier, publishing its own tariffs, and was not on the rails of the line-haul carriers. They merely had trackage rights over the rails of the Junction Company to reach the yards, but no right to go upon the Yard Company's premises. The tariffs placed the duty of loading and unloading on the shipper. The service was a part of the transportation to be performed on the premises of the terminal carrier, by its forces and pursuant to its tariff. The Commission found:

> "In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate." (R. 138).

III.

THE STOCK YARDS WERE NOT THE TERMINALS OF THE LINE-HAUL CARRIERS.

The Yard Company was operating a great public market to which the live stock was consigned for sale. It was the owner and in exclusive possession of the facilities for un-

loading and delivery in the sales pens. Such was the transportation service it performed under its tariffs. The line-haul carriers had no contract with the Yard Company or right to go upon its premises, and had no financial interest in the Yard Company or its property. They placed the live stock at the docks in the same way cars are placed on transfer tracks of connecting or terminal carriers generally.

IV.

THE YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, AND ITS TARIFFS PRESCRIBING CHARGES FOR ITS TRANSPORTATION SERVICES FURNISH THE LEGAL RATE THEREFOR, WHICH IT WAS BOUND TO GOLLECT.

United States vs. Union Stock Yards & Transit Co., 226 U. S. 286.
Chicago Livestock Exchange vs. A. T. & S. F. Ry. Co., 52 I. C. C. 209.
Chicago Livestock Exchange vs. A. T. & S. F. Ry. Co., 58 I. C. C. 164.
Louisville & Nashville Ry. Co. vs. Maxwell, 237 U. S. 94-7-8.
Keogh vs. C. & N. W. Ry. Co., 260 U. S. 156-163.
Louisville & Nashville Ry. Co. vs. Central Iron Works, 265 U. S. 59-65.

Loading and Unloading was a Transportation Service for which the Carrier Performing the Service was Entitled to Compensation and for which the Shipper was Bound to Pay.

Covington Stock Yards vs. Keith, 139 U. S. 128-136.
United States vs. Union Stock Yards & Transit Co., 226 U. S. 286-304.
Act to Regulate Commerce, Sec. 1, Par. 3, (49 U. S. C. A., Sec. 1, Par. 3, Pg. 11).
C. M. & St. P. Ry. Co. vs. Wisconsin, 238 U. S. 491.

The transportation service of unloading was necessarily performed on the premises, with the facilities and by the employes of the Yard Company. It was entitled to compensation therefor and its tariffs fixed its charges. To the extent such charges were not absorbed pursuant to tariffs of connecting carriers, it was entitled and bound to collect.

V.

THE INCREASED CHARGE OF 25c PER CAR WAS COLLECTED FROM THE SHIPPER BY THE YARD COMPANY AND THE CIRCUIT COURT OF APPEALS CORRECTLY SO HELD.

Petitioners allege (R. 13) and the Commission found (R. 123) that:

> "The Stock Yard Company collected and retained such charges from the shippers."

The undisputed testimony in behalf of all petitioners is that checks payable to the Yard Company were given covering these charges. The fact that composite bills covering the freight charges and the increased charge of the Yard Company were presented and paid in one check to the Yard Company, and that the Yard Company turned entire amount over to the line-haul carriers weekly and presented its bills monthly, for both the absorbed and unabsorbed portion of its charges, did not deprive the act in collecting from the shippers of being the act of the Yard Company. Such facts do not overcome the finding of the Commission that the Yard Company collected and retained such charges. The practice of including in one bill the charges of both the line-haul and terminal carriers was a usual one. In holding that the charges were collected by the Yard Company, the Circuit Court of Appeals was in harmony with the finding of the Commission and with the facts.

VI.

THE MAKING AND COLLECTING OF A SEPARATE CHARGE FOR THE SERVICE OF THE YARD COMPANY IN LOADING AND UNLOADING THE LIVESTOCK WAS NOT AN UNLAWFUL OR UNREASONABLE PRACTICE, AND SUCH FINDING OF THE COMMISSION IS WITHOUT SUPPORT IN THE EVIDENCE AND IS CONTRARY TO THE EVIDENCE AND ALSO CONTRARY TO LAW.

Interstate Commerce Commission vs. C. B. & Q. R. R. Co., 186 U. S. 320.

Interstate Commerce Commission vs. Stickney, 215 U. S. 98-104-5.

Act to Regulate Commerce, Sec. 6, Pars. 1 & 7, (49 U. S. C. A., Sec. 6, Pars. 1 & 7, Pgs. 238-283). (Appendix 130, 131).

VII.

NEITHER THE EFFORTS OF THE YARD COMPANY TO FORCE THE LINE-HAUL CARRIERS TO PAY ITS INCREASED CHARGE BY INSERTING IN PARENTHESES IN ITS TARIFF THE WORDS, "AS A CARRIER'S AGENT," NOR ITS ALLEGED ADMISSIONS CAN CREATE AN OBLIGATION ON THE LINE-HAUL CARRIERS TO PAY SUCH CHARGE OR CREATE A LIABILITY ON THEIR PART FOR THE COLLECTION OF SUCH CHARGES BY THE YARD COMPANY.

Act to Regulate Commerce, Sec. 6, Par. 4 (49 U. S. C. A., Sec. 6, Par. 4, Pg. 281). (Appendix 131).

The line-haul carriers were not named in, nor did they concur in the Yard Company's tariff. They did not authorize the Yard Company to increase its charges and refused to increase their absorptions to cover same. The Yard Company was not their agent and the Commission so found. (R. 137).

Such fact is also conclusively shown in the testimony. Admissions and acts of an alleged agent cannot bind the alleged principal who promptly repudiates same. The Yard Company was not under Federal control.

VIII.

CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT, BUT ONLY FOR DAMAGE RESULTING FROM THE "COLLECTION OR ENFORCEMENT BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL OF RATES, FARES, CHARGES, REGULATIONS AND PRACTICES."

Davis, Agent vs. Donovan, 265 U. S. 257-263.
Transportation Act 1920, Section 206-c, (49 U. S. C. A. Sec. 74, Pg. 357). (Appendix 132).

IX.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS FURNISH THE MEASURE OF THEIR OBLIGATION AND LEGAL RIGHT TO CONTRIBUTE TO THE PAYMENT OF THE YARD COMPANY'S CHARGES.

Act to Regulate Commerce, Sec. 1, Par. 6, (49 U. S. C. A. Sec. 1, Par. 6, Pg. 237). (Appendix 130).
Act to Regulate Commerce, Sec. 6, Par. 7, (49 U. S. C. A. Sec. 6, Par. 7, Pg. 237). (Appendix 131).

Section 1, Paragraph 6, of the Act to Regulate Commerce makes it the duty of all common carriers to establish and enforce proper classifications with reference to which rates are prescribed and proper regulations affecting same and in respect to the form and substance of tickets, bills of lading, etc. Section 6, Paragraph 7 of the Act, forbids participation

in transportation by any common carrier until it has complied with Paragraph 6 of Section 1, and further provides that no carrier shall refund or remit in any manner any portion of the rates so specified or extend to any shipper any privilege or facilities except such as are specified in the tariffs. The absorption tariff constituted a concession to the shipper, a remission of a part of the line-haul rate, which could be justified only by filing a tariff fixing the amount to be absorbed. It was just as essential to comply with the absorption tariffs as any other tariffs of the carriers.

X.

THE DECISION OF THE DISTRICT COURT THAT THESE PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION WAS CORRECT.

Order of reparation was made to petitioners in their own names and right and not in any representative capacity and suit was brought by them in the District Court in their own names and right and not in any representative capacity to recover damages for a violation of the provisions of the Interstate Commerce Act, and upon their failure to show that they had suffered any pecuniary loss therefrom the District Court was justified in directing a verdict in favor of the respondents.

Upon appeal the Court of Appeals affirmed the judgment of the District Court but upon wholly different grounds, deciding the case on the merits. *Adams, et al. vs. Mellon, et al.*, 51 Fed. (2d) 620.

Even though the District Court may have given erroneous reasons for its judgment in favor of the defendants, such error did not result in prejudice to the petitioners because they were given their day in court by the Court of Appeals when it rested its judgment on the merits.

Camp vs. Gress, 250 U. S. 308, 317.
Y. & M. V. Ry. Co. vs. Mullins, 249 U. S. 531, 532-533.

The only party entitled to recover reparation is the one who paid and bore the charges on account of which recovery is sought, and who has been damaged thereby.

Sections 8 and 16 of the Interstate Commerce Act. The charge in question was paid, that is, advanced by the commissionmen, petitioners, out of the monies belonging to the consignors. The petitioners sold the live stock sent to them as commissionmen and out of the proceeds from said sales paid the alleged unlawful charge and after deducting the same, remitted the balance to the consignors.

Penna. R. Co. vs. International Coal Co., 230 U. S. 184, 200.
Spiller vs. A. T. & S. F. Ry. Co., 253 U. S. 117, 135.
Parsons vs. C. & N. W. Ry., 167 U. S. 447.
Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 430.

The order of the Commission awarding reparation to the petitioners having been based on the decision of the Commission in the case of Missouri Portland Cement Co. vs. Director General, 88 I. C. C. 492, and said decision being contrary to law, said order was invalid.

The Commission held in the *Portland Cement* case that the party entitled to recover reparation was he who physically paid the unlawful charge although he may have suffered no pecuniary loss by so doing. In reaching this conclusion, the Commission misconstrued the opinion of this

court in *Southern Pacific Co. vs. Darnell-Taenzer Co.*, 245 U. S. 531. The Commission construed said opinion as holding that the Commission was only required to ascertain who physically passed the money to the carrier, and that it was immaterial to inquire as to whether such party actually suffered any pecuniary loss on account of having made such payment. The Commission also failed to properly interpret the decision of this court in *L. & N. R. Co. vs. Sloss-Sheffield Co.*, 269 U. S. 217. Also see *Illinois Central R. Co. vs. Vest, et al.*, 39 Fed. (2d) 658.

XI.

NO QUESTION OF PUBLIC IMPORTANCE OR OTHER QUESTION JUSTIFYING THE GRANTING OF A WRIT OF CERTIORARI IS PRESENTED, AND IT MUST NOW APPEAR THAT THE WRIT IN THIS CASE WAS IMPROVIDENTLY GRANTED AND SHOULD BE DISMISSED.

Layne & Co. vs. Western Well Works, Inc., et al., 261 U. S. 387-393.
Magnum Import Co. vs. Coty, 262 U. S. 159-163.

Having shown that the line-haul rate plus the $2.00 terminal charge did not include the unloading of the live stock, that the Yard Company did not occupy the relation of agent to the line-haul carriers in performing its transportation service or in filing its tariff, and that the Circuit Court of Appeals did not in its decision usurp the function of the Commission, it must now appear that the questions presented in the petition for certiorari upon which the writ was granted and which are urged in petitioners' brief, are not presented by the real facts in the case and that the writ was therefore improvidently granted and should be dismissed.

ARGUMENT.

I.

FUNDAMENTAL MISCONCEPTIONS OF PETITIONERS AS TO THE FACTS.

Petitioners' contentions are very largely based on fundamental misconceptions of the true facts in the case. They mistakenly contend:

(A) That the published tariffs of the line-haul carriers cover the complete transportation of the live stock from point of origin to the Stock Yards, including the unloading at the yards in consideration of the line-haul rate, plus a $2.00 terminal charge, whereas the undisputed testimony is that such tariffs covered transportation to the docks of the Yard Company only with the obligation, however, because of their absorption tariffs, to pay the Yard Company's charges to the extent of 25c for unloading and 50c for loading each car of live stock.

(B) That the Yard Company in filing its tariffs covering its charges and in performing the unloading service did so as agent of the line-haul carriers, whereas the testimony and the law conclusively establish the contrary.

(C) That administrative functions of the Commission were exercised in making the order relied upon, whereas such functions were in no way involved.

When such mistaken notions as to the facts are shown, the legal propositions presented by petitioners will be found to be largely without relevancy. We therefore give such matters first consideration.

A. The Published Tariffs of the Line-Haul Carriers Covered Transportation to the Stock Yards, But Did Not Include Unloading the Stock.

Such tariffs did provide for absorbing the Yard Company's charges for unloading in the specific amount of 25c

per car. The Yard Company was an independent common carrier performing part of the transportation to destination on its own premises and with and upon its own facilities. It published and maintained its own tariffs which covered the loading and unloading of the live stock. *United States vs. Union Stock Yards and Transit Co.*, 226 U. S. 286. Notwithstanding change in its lease with the Junction Company after being required to file its tariffs as a common carrier in the foregoing suit, the Commission in its first opinion (R. 128) 52 I. C. C. 209, held that it was still a common carrier and required to maintain its tariffs, which conclusion was adhered to in its second opinion, (R. 144), 58 I. C. C. 164, and the Yard Company was refused permission to cancel its tariff. The entire transportation, therefore, involved the movement on the rails of the line-haul carriers and over the rails of the Junction Company to the yards, for which the line-haul rate, plus the $2.00 terminal charge, was applicable, and over the docks through the chutes and passageways of the yards to the sales pens of the commission men covered by the Yard Company's tariff. Not only the tariffs of the line-haul carriers and the Yard Company differentiated between the service of the respective carriers, but the ownership of the docks and yards and the physical facts preclude any idea of the line-haul rate and $2.00 charge covering the unloading. The tariffs of the line-haul carriers covering transportation to the Stock Yards were not offered in evidence either before the Commission or the Court, but the testimony offered in respect thereto not only does not show the transportation by the line-haul carriers covered the unloading, but conclusively shows the contrary.

The absorption tariffs in which all line-haul carriers joined, known as the "Lowery Tariff", and covering terminal charges which would be absorbed by the line-haul carriers was not offered in evidence before the Commission, but was offered in Court. Such tariff is attached to Defendant's Ex-

hibit 1 as Exhibit 2 thereto. This exhibit is not printed in the record, but the original was certified as a part thereof and is before the Court. The absorption tariff, (Page 37), provides:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car
50	25 "

All line-haul carriers joined in such tariff. The rates of the line-haul carriers were predicated on the live stock being loaded and unloaded by the shippers. (Witness Byers, Defendant's Exhibit 6, page 459; not printed in record, but original certified up as a part thereof).

The tariffs of the line-haul carriers were with reference to the appropriate classifications and referred thereto, and to the absorption tariff for the terminal charges that would be absorbed. (Witness Byers, Defendant's Exhibit 7, pages 1251 and 1252, not printed in record, but certified up as a part thereof).

In Defendant's Exhibit 1, it is stipulated by the parties that the classifications provide "general regulations, form of contracts and terms and conditions for the said transportation by said line-haul carriers." (R. 297, Paragraph 12 and Paragraph 16; R. 298, Paragraph 20; R. 299, Paragraph 23).

The Classifications provided:

"The consignor and consignee are responsible for the loading and unloading the same, the carrier assuming

no liability whatever in regard to the loading and unloading."

(Official Classification, Rule 8, page 223, Exhibit 3 to Defendant's Exhibit 1; Western Classification No. 54, Rule 11, page 249, Exhibit 4 to Defendant's Exhibit 1; Western Classification No. 55, Rule 3, page 282, Exhibit 5 to Defendant's Exhibit 1; Consolidated Freight Classification No. 1, issued by the Director General and including all carriers under Federal control, page 64, Exhibit 6 to Defendant's Exhibit 1).

Consolidated Classification, Rule 8 (b), page 70, Section 1, being Exhibit 6 to Defendant's Exhibit 1, and Western Classification No. 55, Rule 22, page 13, Section 1, being Exhibit 5 to Defendant's Exhibit 1, provide:

> "Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

Illinois Classification covering intrastate shipments in Illinois, Rule 19, provides:

> "(b) Consignors and consignees will be required to load and unload all freight upon which carload ratings are applied." (Exhibit 6 to Defendant's Exhibit 1).

All shipments involved consisted of carloads moving on carload ratings. (Stipulation of parties, Defendant's Exhibit 1, R. 240, Paragraph 44.)

Defendant's Exhibit 1 is a Stipulation of Facts in forty-six paragraphs and is printed in the record. Preamble, Paragraphs 1 to 11 both inclusive, and paragraphs 26 to 46 both inclusive, are found in Record 232 to 240, and paragraphs 12 to 25, both inclusive, are found in Record pages 296 to 299, both inclusive. The exhibits to Defendant's Exhibit 1 are not printed, but the original Defendant's Exhibit

1, with all exhibits thereto, has been certified up as a part of the record.

The Uniform Livestock Contract published in the Official and Consolidated Classifications, and used by all line-haul carriers for many years provided in the receipt for the live stock as follows:

> "THIS AGREEMENT * * * WITNESSETH, That the carrier has received from the shipper, subject to the classifications and the tariffs in effect, on the date of issue of this Agreement, the live stock described below in apparent good order, except as noted, consigned and destined as indicated below, *which the carrier agrees to carry to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination.*" (Italics ours).

Said contract also provides in Section 5 of Conditions that the shipper is to load and unload the live stock at his own expense. (Exhibit 3 to Defendant's Exhibit 1, pages 71 and 72; Exhibit 6 to Defendant's Exhibit 1, pages 62 and 63; Testimony Witness Mosier, Defendant's Exhibit 6, page 150 not printed in record, but original certified up as a part thereof).

During the time the Yard Company's charges were 25c for unloading and 50c for loading, the absorption tariff of the line-haul carriers permitted them to pay the full amount of the Yard Company's charges, and during such time the shippers paid only the line-haul rates plus the terminal charge of $2.00, but that does not mean that the line-haul carriers held themselves out to transport the stock to the Stock Yards and unload the same for the line-haul rate, plus the terminal charge. It means that so long as the absorption tariff might remain in effect and the Yard Company's charges remained the same, the shipper would have to pay no more than such rates. The fact that the amount agreed to be absorbed covered the entire charge of the Yard Company furnishes the only foundation for petitioners' claim that the line-

haul carriers' tariffs covered the unloading as well as the transportation of the live stock to the Stock Yards.

Such fact also furnishes the only basis for the statement in the Commission's second opinion, (R. 144), that

> "For more than fifty years, carriers delivering live stock at the stock yards in Chicago have loaded and unloaded live stock and made no charge therefor against the shipper."

This suggestion, coupled with the fact that the shipper could not do the physical act of loading and unloading, furnshes the ostensble reason for the change in the Commission's views as to whose duty it was to do those acts. The loading and unloading were required to be done on the premises owned and in exclusive possession of the terminal common carrier, and neither the shipper nor the line-haul carrier could go upon such premises to perform such service without its consent, and neither had such consent.

The terminal carrier did the loading and unloading and the line-haul carrier during such period absorbed its charges —pursuant to published tariffs, limiting the amounts that would be absorbed to specific amounts in cents per car. Such facts, however, do not justify the statement in the Commission's opinion that the unloading was done by the "carriers delivering live stock at the stock yards;" nor do such facts justify the contention that such service is included in the tariffs of the line-haul carriers further than the provision in the absorption tariffs for absorbing a specific amount of the Yard Company's charges for performing such service.

Petitioners repeatedly assert that the terminal charge included the loading and unloading of the live stock. Such statement is erroneous. The terminal charge was established on account of the charge the Junction Company made against the line-haul carriers for use of its rails in moving the cars, by the line-haul carriers over the Junction Company's rails

to and from the Stock Yards, and also took into consideration the fact of the absorptions the line-haul carriers were making pursuant to their absorption tariffs. The trackage charge made by the Junction Company against the line-haul carriers was 75c per car each way (loaded one way and empty the other), a total of $1.50 per car. The cost to the line-haul carriers in moving the car each way with their own locomotives and crews was a substantial amount, and in addition, the line-haul carriers were absorbing 25c for unloading and 50c for loading each car of live stock. (Testimony Witness Byers, Defendant's Exhibit 6, pages 475-6, not printed in record, but original certified up as a part thereof).

These facts justified the *amount* of such $2.00 terminal charge, but do not show any agreement or obligation to do the unloading as such. The absorption tariff was a notice to the shippers that they would be relieved from the payment to the Yard Company of its tariff rates, to the extent, therein specifically stated; viz., 25c per car for unloading and 50c per car for loading, and that the trunk line carriers would pay such amounts to the Yard Company for its services; not that such trunk line carriers would perform the services themselves, but simply that they would pay said amounts to the Yard Company for the services performed by it. The tariffs, classifications and Uniform Livestock Contract precluded the idea of any obligation to load or unload. There was no obligation on the part of the trunk lines to continue such absorptions, and if said absorption tariff had been withdrawn, the shippers would have had to pay to the Stock Yard Company the amount of its tariff rates, in addition to the road-haul rates, plus the terminal charge of $2.00 per car.

The fact that the amount being absorbed for loading and unloading was considered at the time the $2.00 charge was established would not require the increasing of the absorptions to cover increased charges of the Yard Company without increasing the terminal charge. This thought is empha-

sized when it is remembered that the terminal charge was established because of the trackage charge of the Junction Company and the amounts being absorbed for loading and unloading. On a car loaded in an empty out, the line-haul carrier paid the Junction Company 75c each way or $1.50 for the movement in and out, and also paid the Yard Company for unloading 25c, making a total of $1.75, leaving but 25c to cover services of its crew and equipment in making the movements.

In case of a car loaded at the yards, the absorption was 50c for loading, thus consuming the entire $2.00 charge and leaving nothing for the services of the crew and equipment of the line-haul carrier. When we remember the reasonableness of the $2.00 charge is not attacked in this case, and that it was found reasonable in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320, when operating costs were much lower than during the time complained of, the facts presented would seem to preclude any idea of an obligation on the part of line-haul carriers to assume payment of the Yard Company's increased charges.

In their statement of facts on page 5 of their brief, petitioners say:

> "The Union Stock Yards is specifically named in the tariffs of the line-haul carriers as a station to which their line-haul rates apply."

They cite page 167 of certified excerpts from original exhibits. Such page 167 is a portion of Exhibit 2 to Defendant's Exhibit 1—the Lowery Tariff, covering terminal and absorption charges of the line-haul carriers. This tariff does not show line-haul rates at all. On page 167, being page 35 of the Exhibit from which it is taken, the Union Stock Yards, Illinois, is shown to be a station on the Chicago Junction Railway, and there is nothing thereon to justify petitioners' statement quoted above.

On page 169 of such certified excerpts of original exhibits is set forth page 37 of Exhibit 2 to Defendant's Exhibit 1. It will be noted same states, about middle of page:

> "Basis for rates to and from facilities of the Chicago Junction Railway."

Beneath such statement, among other things, are found rates on live stock from or to industries, chutes and sidings of the Junction Company in carloads. This statement contains the terminal charge for moving a car of stock between the rails of the line-haul carrier and the Stock Yards over the rails of the Junction Company. Also beneath such statement, "Basis for rates to and from facilities of the Chicago Junction Railway," is the following:

> "Carriers as shown will pay the Union Stock Yards and Transit Co.'s charges as follows: Loading charges, 50c; unloading charges, 25c."

These tariffs, therefore, do not justify statement of petitioners above quoted and do show the contrary of petitioners' statement to be true. The finding of the Commission in this proceeding likewise refutes petitioners' contention that the line-haul rate, plus the $2.00 terminal charge, includes the service of unloading. In the course of its first opinion, the Commission stated:

> "Its (Yard Company's) facilities for loading and unloading live stock are not on the rails of the line-haul carriers, and these facilities are reached by the rails of the Chicago Junction Railway." (R. 136).

The Commission also found:

> "In *Boardman & Co. vs. S. P. Co.*, 37 I. C. C. 331, the Commission stated that in the absence of tariff provisions to the contrary, the line-haul rate of a particular carrier includes the receipt or delivery of carload freight

only at industries or other points located upon its own rails. In this case there are no tariff provisions requiring the line-haul carriers to make deliveries off their rails." (R. 138).

In its first opinion, (R. 138), the Commission found:

> "In the absence of tariff provisions to the contrary, this (loading and unloading) is a separate and distinct service not included in the transportation rate."

The only tariff provision of the line-haul carriers having reference to loading and unloading is the absorption tariff providing for absorbing specific amounts in cents per car. That tariff did not assume any obligation in respect to the acts of loading and unloading. Such acts were physically performed by the Yard Company, as the commission found. Such tariff merely provided for paying the Yard Company's charges for loading and unloading in the amount of 25c for unloading and 50c for loading. Surely the absorption tariff is not a "tariff provision to the contrary." The absorptions under the Lowery Tariff were before the Commission at the time of rendering its first opinion; also when rendering its second opinion. In the first opinion the Commission assumes that the absorption tariff is not a "tariff provision to the contrary," and in its second opinion, the Commission does not find that it does constitute such a tariff provision, but it appears to rely on the fact of such absorptions for the finding that the carriers bringing the live stock to the Stock Yards, had for fifty years been doing the loading and unloading without expense to the shipper. Such conclusion is not the result of administrative discretion, but if it were, the evidence conclusively shows that it is erroneous.

The Commission merely treated the fact that the absorptions during such period included the Yard Company's entire charge as constituting loading and unloading by the carrier bringing the live stock to the yards. In view of the

fact that the Yard Company actually did the loading and unloading, that the line-haul carriers merely complied with their absorption tariffs limiting their payments to specific amounts in cents per car, and of the fact that Paragraph 7, Section 6 of the Act to Regulate Commerce, (49 U. S. C. A. Section 1, Paragraph 6, page 12) expressly requires carriers to establish, observe and enforce classifications, rules and regulations in reference to rates, service and practices, including tickets and bills of lading and of the rules and regulations and provision of Live Stock Contract to which attention has been called, limiting the transportation of the line-haul carriers to their own lines, and expressly requiring the shipper to load and unload, it must be conclusively apparent that the service and rate of the line-haul carriers did not include the unloading or loading at the Stock Yards.

It is conclusively shown that the facilities of the Yard Company devoted to public use and with and upon which it performed its public carrier service were beyond the rails of the line-haul carriers. They could be reached only by passing over the rails of another common carrier (Junction Company). The right to pass over the rails of the Junction Company to the Stock Yards gave no rights in respect to the Stock Yards. There was no contract between the Yard Company and the line-haul carriers, and the relation existing between them on tendering shipments of livestock was that created by the law in respect to common carriers engaged in interstate commerce. It is thus seen that the record does not support petitioners' contention that the tariffs of the line-haul carriers covered the unloading of the live stock at the Stock Yards. On the contrary, the record affirmatively shows that the unloading was not included in the transportation furnished by the line-haul carriers or the line-haul rate plus the $2.00 terminal charge.

B. The Yard Company Was Not the Agent of the Line-Haul Carriers in Performing Any Transportation Service or in Publishing and Enforcing its Tariffs.

The Yard Company was an independent common carrier and was required by the Commission and the Court to publish and file a tariff covering its charges. (*United States vs. Union Stock Yards & Transit Company*, 226 U. S. 286). The line-haul carriers were not parties to that suit. The status of the Yard Company only was involved. In that case it was said:

> "The transportation of live stock begins with their delivery upon the cars and ends only after the stock has been unloaded and delivered, or offered to be delivered to the consignee, etc."

Because the Yard Company was the owner and operator of the facilities for unloading and delivering the stock, it was held to be a common carrier and required to file tariffs containing its charges for the service it performed. It could not as such common carrier having a sole duty of filing tariffs of its charges become the agent of the line-haul carriers in filing its tariffs or in performing its service without some provisions in the law binding upon all parties, or authority from the line-haul carriers. There is no thought, in the suit brought by the Commission, to force the Yard Company to file tariffs, that it should do so as agent of the line-haul carriers, as principals, otherwise the principals would have been made parties to the suit. There was no statutory provision creating that relation and no authority from the line-haul carriers. The only basis of petitioners' contention that such relation existed is the acts and statements of the Yard Company and its representatives, which were entirely gratuitous and continuously and publicly challenged and denied by the line-haul carriers. The admis-

sions, statements and conduct of an alleged pretended agent are not competent evidence against the alleged or pretended principal to prove that an agency exists. Such doctrine is elementary and fundamental. The Yard Company was attempting to relieve itself of the responsibility of a common carrier in order to force the line-haul carriers to assume payment of its charges and relieve the shippers who were its customers of such duty. Its tariffs filed in pursuance of the order of the Court did not contain any suggestion of agency. Thereafter it changed the form of its lease with the Junction Company in the hope of escaping its common carrier capacity, and when it increased its charges, injected in its statement of charges in parentheses the words "as a carrier's agent."

In its cancellation tariff which was suspended by the Commission and in which it sought to repudiate its capacity as a common carrier, it stated:

> "The loading and unloading platforms of the Union Stock Yards and Transit Company of Chicago will in the future be used or available for the use of the railways entering Chicago and using them as terminal stations under operating agreements."

This cancellation tariff which was suspended and never in effect does not claim any agency, but it does hold out an invitation to the line-haul carriers to make a contract with it. Such contract was never made. In no other tariff of the Yard Company, either before or subsequent to the one increasing its charges, was there any suggestion of agency. (Exhibit 1 to Defendant's Exhibit 1, original certified as a part of the record to this Court).

That the Yard Company had no authority from the line-haul carriers to publish such tariffs or to increase its charges or to act for them in doing so, is shown by the testimony of General Manager Henkle of the Yard Company (Defend-

ant's Exhibit 6, pages 344-354; Defendant's Exhibit 7, page 1212), and of Auditor Chace of the Yard Company, (Defendant's Exhibit 6, page 372); also by testimony of H. W. Byers, Freight Traffic Manager, Chicago & North Western Railway Company (Defendant's Exhibit 7, page 1260).

Section 6, Paragraph 4, of the Act to Regulate Commerce provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission.* * *" (49 U. S. C. A., Section 6, Paragraph 4, page 281, appendix 131).

The tariff of the Yard Company does not contain the names of the line-haul carriers as parties thereto, or otherwise. (Exhibit 1 to Defendant's Exhibit 1). The files of the Commission show no concurrence therein by the line-haul carriers. (Testimony Witness Gohegan. Defendant's Exhibit 11, page 1242.) The Yard Company's tariff was therefore not a joint tariff and was not filed as agent of the line-haul carriers. As an independent common carrier having its own responsibilities and duty, and in performing the common carrier's service upon its own property devoted to public use, the Yard Company was in no sense an agent of the line-haul carriers. That the Yard Company was not the agent of the line-haul carriers was found by the commission in its first opinion. (R. 137).

That it was their agent in collecting freight charges, just as any delivering carrier collects freight charges of the initial carrier, may be conceded, but such fact does not show or create the relation of agency in reference to transportation services. Suggestion is made that the fact that the Yard Company counted the stock, checked their condition, un-

loaded and made a record of the dead and injured, is evidence of agency. Such services, while necessary to be performed for the protection of the carrier, are no part of the transportation, but if they were, they were the services that every delivering carrier performs for its own protection and in its own interest, as well as that of the initial carrier. Since suit may be brought and a recovery had against either for any loss, damage or injury to an interstate shipment, and a remedy is given the carrier held liable to the shipper against its connecting carrier, it is necessary as between connecting carriers that condition at time of delivery by one carrier to another, and to the consignee, be ascertained and evidence thereof made available. That one carrier depends upon another for such matters does not make the other its agent, but merely shows willingness to rely upon its diligence and fairness. Reciprocity in such matters is the usual practice among connecting carriers. Surely petitioners' contention that the Yard Company was the agent of the line-haul carriers in filing its tariffs and in performing its transportation services is without any foundation in law, and cannot be the basis of a liability on the part of the Director General.

C. No Matter of Administrative Discretion was Involved in the Decision of the Interstate Commerce Commission.

Petitioners lay great stress upon the thought that the tariffs of the carriers were voluminous and complicated; that the Circuit Court of Appeals, in construing them, usurped the function of the Commission. Petitioners entirely misapprehend the facts. The tariffs of the line-haul carriers covering the line-haul rates were not offered in evidence. Such tariffs were assumed to furnish a commodity rate, but neither the amount of it nor the language used in stating the rate were before the Commission or the Court. The tariff covering the $2.00 terminal charge was not before

the Commission, although the amount thereof was stated by witnesses, together with the elements entering into it, when established, and the service performed in respect to it. The absorption tariffs were not before the Commission but the substance thereof was shown in the testimony. Such tariffs were before the Court as Exhibit 2 to Defendant's Exhibit 1, and we have seen the language thereof is as simple as language can be—no room for construction.

The classifications were not before the Commission, but oral evidence of their provisions in certain respects was presented. Excerpts from such classifications covering pertinent provisions were before the Court as exhibits to Defendant's Exhibit 1. The Yard Company's tariffs were not in evidence before the Commission, but oral evidence of the provisions thereof was offered. Such tariffs were offered as evidence in Court as Exhibit 1 to Defendant's Exhibit 1. The foregoing are the only tariffs involved and they are neither voluminous, complicated or ambiguous; nor do they contain any technical terms requiring construction by the Commission. The tariff provisions are of the character presented in *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U. S. 285-294. The language of this Court in that case is peculiarly pertinent:

> "Here no fact, evidential or ultimate, is in controversy and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of the words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction, and preliminary resort to the Commission was therefore unnecessary."

In the very recent case of *United States Navigation Co. vs. Cunard S. S. Co.*, 52 Supreme Ct. Reporter, 247-9, it is said:

> "But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

In the case at bar there is no dispute in the evidence. There are no inferences of an administrative or discretionary character to be drawn therefrom. The Commission did not consider the reasonableness of any rate, did not consider the amount of absorption the line-haul carriers should reasonably make, did not find discrimination, but on the contrary, did find that failure to absorb all of the Yard Company's charges at Chicago, while at other points all such charges were absorbed, did not amount to discrimination. (R. 135-139).

The Commission's award of reparation is based on its finding:

> "As the services of unloading and loading are a part of the transportation of live stock, the collection of separate charges from the shippers for unloading or loading, in addition to the rates on livestock from and to interstate points to and from the Stock Yards, was an unlawful and unreasonable practice." (R. 144-145).

In view of the fact that such finding is based on undisputed facts, a question of law was presented, and the finding of the Commission is one of law rather than of administrative discretion and was, we think, so intended by the Commission. As said in *Interstate Commerce Commission vs. Louisville & Nashville R. R. Co.*, 227 U. S. 88-91:

> "But the legal effect of evidence is a question of law."

The provisions of Section 16 paragraph 2 of the Act to Regulate Commerce making the findings and orders of the Commission *prima facie* evidence of the facts found there-

in furnish a rule of evidence which may be supplemented or contradicted by any competent evidence. Such provisions furnish only a rebuttable presumption in cases of this character, and the findings and orders of the Commission will be set aside if contrary to the indisputable character of the evidence, or contrary to law. *Meeker vs. Lehigh Valley Railroad Company*, 236 U. S. 412-428; *Interstate Commerce Commission vs. Louisville & Nashville Railway Co.*, 227 U. S. 88-91-92; *Interstate Commerce Commission vs. Union Pacific Railroad Co.*, 222 U. S. 541-7; *C. R. I. & P. Railway Co. vs. United States*, 274 U. S. 29-33. The evidence relied on must be offered at a hearing. The Commission cannot rely on matters within its own knowledge, but not offered as evidence. *Chicago Junction* case, 264 U. S. 258-63.

The facts relied on by the Commission and before this Court are that the Yard Company was and is a common carrier, that at the suit of the Commission, this Court so held and required it to file and maintain tariffs covering its loading and unloading charges; that it complied with such requirement; that the line-haul carriers were also required to file tariffs covering their charges; also all departures therefrom, and all allowances or concessions to shippers, and to maintain classifications which they were obliged to adhere to; that they filed their line-haul tariffs and terminal tariffs as well as their classifications; that the terminal tariffs provided for a $2.00 terminal charge and their absorption of 25c for unloading and 50c for loading each car of stock by the Yard Company; that their classifications and their live stock contracts required the shipper to load and unload at his own expense; that departure therefrom was not permitted except by tariff provisions; that the absorption tariffs were a departure to the extent specifically stated in cents per car; that the tariffs covered delivery to destination if on the carrier's line; otherwise delivery to connecting carrier; that the loading and unloading docks, chutes and

yards were not on the lines of the line-haul carriers, but were the facilities of the Yard Company devoted by it to public use; that for many years the absorptions of the line-haul carriers had equaled the Yard Company's charges and the shipper had not been obliged during such period to contribute thereto; that the Yard Company increased its charges and the line-haul carriers refused to increase their absorptions, with the result that collection of the increase was made from the shipper. None of these facts or any other fact was in dispute. In view thereof, a question of law was presented and it was within the province of the Court to determine whether the Commission decided such question of law correctly.

It will be noted that the finding of the Commission was not that the loading and unloading should be performed without charge to the shipper. The service being for the shipper's benefit and a part of transportation, the requiring of the performance thereof without charge would be contrary to the Constitution and would amount to the taking of property without just compensation and without due process of law. That was not intended by the Commission. What it did find was that the collection of *separate* charges therefor was "an unlawful and unreasonable practice."

In other words, the charge should be, in the view of the Commission, included in the line-haul rate or in the terminal charge. That was a conclusion of law. That the making of a separate charge for a terminal service is not unlawful was held in respect to the $2.00 terminal charge in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320. That case was in reference to the terminal charge of the line-haul carriers while here we have the only transportation charge made by a terminal carrier for its own services.

The Commission in its opinion made no reference to the provisions of Paragraph 1, Section 6 of the Act to Regulate

Commerce (49 U. S. C. A., Section 6, Paragraph 1, pages 240-241, appendix 130), which provides:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force, *and shall also state separately all terminal charges,* storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise shall affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

In view of the foregoing provision of the Commerce Act, as we will show in a later division hereof, it would have been proper for the line-haul carriers, in cases of delivery on their own lines, to make a separate charge for unloading, and if reasonable and the line-haul rate reasonable, both charges would be upheld. In the case at bar, however, the separate charge is that of an independent common carrier for its only transportation service for which it made a charge. In view of the statute and of the facts, the conclusion of the Commission was not in the exercise of an administrative discretion, but was the determination of a question of law, and its conclusion subject to be reviewed by the Court.

The Yard Company had been required to file its tariffs covering the specific charge in question. Without such tariff it could not engage in the transportation and could not receive any compensation. Not only was it required to file its tariffs, but the Commission refused to permit it to withdraw them. In such a case, the collecting of the charge contained in its tariff cannot, as a matter of administrative discretion, be found to be unlawful or unreasonable. We say,

therefore, petitioners misapprehend the facts in urging that the Circuit Court of Appeals usurped a function of the Commission.

II.

THE EVIDENCE WAS INSUFFICIENT TO SHOW THE DUTY OF LOADING AND UNLOADING LIVE STOCK AT THE STOCK YARDS WAS THAT OF THE LINE-HAUL CARRIERS OR THAT THE LINE-HAUL CARRIERS SHOULD ASSUME THE EXPENSE THEREOF.

In its first opinion, 52 I. C. C. 209, dated February 15, 1919, (R. 121-141), the Commission held that such duty was that of the shipper. We commend to the Court the entire discussion in the opinion contained on pages 130 to 136 of record leading up to such conclusion. In answering the contention of the shippers, the Commission said:

> "They disregard the facts that the Stock Yard Company is made a common carrier by the terms of its charter; that it has been held to be such by the Supreme Court of the United States; that its facilities for loading and unloading live stock are not on the rails of the line-haul carriers." (R. 136).

Also:

> "It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so, they are entitled to compensation therefor. In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate. We have held that for loading and unloading, and for all other special services apart from conveyance, the carriers may properly make a reasonable charge since they are accessorial parts of the transportation which Section 1 requires the carriers to furnish. Dunnage Allowances, 30 I. C. C. 538-543." (R. 138).

In its second opinion, 58 I. C. C. 164, rendered July 15, 1920, the Commission changed its mind as to whose duty it was to load and unload. In that opinion the Commission states:

> "The facts in this case are not in dispute. For more than fifty years carriers delivering live stock at the Stock Yards, Chicago, have loaded and unloaded live stock and made no charge therefor against the shipper." (R. 144).

We agree the facts are not in dispute. The evidence is the physical acts of loading and unloading were performed by the Yard Company. (Stipulation of Parties, Defendant's Exhibit 1, Paragraph 27, R. 236).

The line-haul carriers merely by virtue of their absorption tariffs paid the loading and unloading charges of the Yard Company so long as such charges did not exceed the amounts named in such tariffs.

The foregoing are the facts before the Commission not in dispute and on which it found the

> "carriers delivering live stock at the Stock Yards have loaded and unloaded live stock."

The evidence does not sustain such finding, but refutes it. The true facts shown are that for fifty years the Yard Company had loaded and unloaded the live stock, charging therefor 50c for loading and 25c for unloading, and that the carriers bringing the live stock to the Yards, had paid such charges pursuant to their absorption tariffs.

In the interval between the first and second opinions of the Commission, Congress in the Transportation Act of 1920, effective February 28, 1920, amended Section 15, Paragraph 5 of the Act to Regulate Commerce (49 U. S. C. A. P. 426, Section 15, Paragraph 5, appendix 132) as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards, shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner."

Such enactment was not relied on to support the Commission's change of mind, but in our view, should have been relied on in support of its first conclusion. Congress evidently believed the shipper was required to pay for the loading and unloading as a separate matter in view of the existing transportation and tariff situations; otherwise it would not have enacted a law to relieve the shipper therefrom. This Act does not mean that the shipper is not to pay for the services rendered him, but that it shall thereafter be included in the line-haul carrier's rate.

Such enactment cannot affect the right of the parties as to past transactions, but does place on the line-haul carriers the duty of so adjusting their line-haul rates as to include compensation for this service and to so amend their absorption tariffs as to cover the entire charge of the Yard Company.

We understand the carriers have so construed the Act and have acted accordingly. That a statute was necessary to bring about the result argues forcefully, if not conclusively, that before the statute such duty did not exist and that the Yard Company performing the service was entitled to collect the charge from the shippers without any obligation on the part of the line-haul carriers, in the absence of absorption tariffs so providing, to pay such charge.

It will be noted the foregoing enactment is limited to ordinary live stock. "Ordinary live stock" is defined in Section 20, Paragraph 11 of the Act to Regulate Commerce, as follows:

"The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes or other special purposes."

Since the Act is limited to *ordinary* live stock, we assume it can have no application to *other* than ordinary live stock, such as for breeding, racing, special purposes and the like. We inquire whose duty is it to load and unload other than ordinary live stock, and can a special charge be made against the shipper for such loading and unloading? If such is the case, upon what theory can the different treatment be based? If there is a duty to load and unload *other* than ordinary live stock by the shipper and if a separate charge can still be made therefor, we inquire why the same rule did not apply to *ordinary* live stock before the enactment forbidding the making of a separate charge for loading and unloading *ordinary* live stock.

It will be noted the amendment to the statute does not require the line-haul carriers to load or unload, does not require the Yard Company, a common carrier, to perform the service gratuitously, but does provide in effect that the line-haul carriers shall pay the Yard Company's charges out of the line-haul rate, and it must follow to be constitutional that the line-haul rate must be high enough to be reasonable in view of the added obligation.

In the foregoing discussion we have omitted reference to the classifications and tariffs of the line-haul carriers by which their contract was governed, and which expressly provide that the shipper shall unload live stock at their expense and which limit the absorptions of the line-haul carriers to specific amounts. Such tariffs, classifications, rules and regulations have been fully discussed under Subdivision A of Division I hereof, and we content ourselves here with referring thereto and with calling specific attention to the

provisions of Paragraph 6, Section 1, of the Act to Regulate Commerce, (49 U. S. C. A., Section 1, Paragraph 6, page 12 appendix 130), which provides:

> "It is made the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable classifications of property for transportation with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts and bills of lading * * *."

Being required to establish classifications, rules and regulations with reference to rates and tariffs, and regulations and practices affecting substance of tickets, bills of lading, etc., the carriers were also required to comply with such classifications, rules and practices. Pursuant to such requirement, the rules already referred to have been established and the reasonableness is not questioned in this proceeding. Pursuant thereto, the Uniform Live Stock Contract was published in the classifications providing that the carrier

> "agrees to convey to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination," and "The shipper at his own risk and expense shall load and unload said live stock * * *."

The Commission in its first opinion held:

> "It is clear that the line-haul carriers are under no obligation to load or unload live stock for shippers, and if they do so, they are entitled to compensation therefor. In the absence of tariff provisions to the contrary, this is a separate and distinct service not included in the transportation rate." (R. 138).

There was no evidence of a tariff provision to the contrary, and nowhere does the Commission recede from the conclusion that in the absence of tariff provisions, the loading and unloading is a separate and distinct service not included in the transportation rate.

Suffice it to say that as a matter of law, as well as tariff regulations, the service of loading and unloading was not included in the transportation rate of the line-haul carriers. So far as the line-haul carriers were concerned, such duty was that of the shipper and could be performed only through the Yard Company as a common carrier engaged in owning and operating the facilities upon which such service was necessarily performed.

III.

THE STOCK YARDS WERE NOT THE TERMINALS OF THE LINE-HAUL CARRIERS.

Such conclusion of the Commission is entirely without support in the evidence and is contrary to law. We have shown that the Yard Company was a common carrier owning and operating the property and facilities on which its service was performed, that it had its own separate tariff covering its operations and charges, that no line-haul carrier had the right to go upon its premises, and did not do so. The fact that line-haul carriers did not maintain adequate yards of their own to accommodate all live stock brought by them to Chicago does not support such conclusion. The live stock was destined to a public market located on the premises of the Yard Company for purposes of sale. Yards maintained by the carriers at some other place would not meet the requirements of the shippers. If unloaded in carriers' yards, the stock would have to be driven through the city to the public market. Such a proceeding would be in-

tolerable. The shippers were entitled to have their stock transported to the market. The stock could only reach the market by going over the docks, into the chutes and through the passage-ways of the Stock Yards to the sales pens. These properties were all a part of the facilities of the independent connecting common carrier performing such services. Such services could be performed by no other carrier and constituted a part of the transportation to the final destination in the sales pens.

There was no contract between the Yard Company and the line-haul carriers and no relation other than that between connecting common carriers. The fact that the facilities constituted unloading docks, chutes and pens instead of rails can make no difference. Just as well say the rails of a terminal railway company on which an industry is located are the terminals of the line-haul carriers delivering carload shipments to the terminal company to be switched by its crews to the industry track of the industry or to team tracks convenient to the industry.

IV.

THE YARD COMPANY WAS A COMMON CARRIER SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, AND ITS TARIFFS PRESCRIBING CHARGES FOR ITS TRANSPORTATION SERVICES FURNISH THE LEGAL RATE THEREFOR, WHICH IT WAS BOUND TO COLLECT.

We hesitate to seriously discuss this proposition. Such was the holding of the Circuit Court of Appeals and the ground upon which it affirmed the judgment of the District Court. We have shown that the Yard Company was an independent common carrier and was forced by the Commission through the judgment of this Court to file tariffs of

its charges, because, as the Commission contended and as the Court found, it was a common carrier in interstate commerce and subject to the Interstate Commerce Act. *United States vs. Union Stock Yards & Transit Co.*, 226 U. S. 286. Neither the Director General nor the corporate line-haul carriers had any interest in the Yard Company. The Yard Company was not a subsidiary of the corporate carriers and was not taken under Federal control by the President. We have shown that no relation of agency existed and no contract of any kind between the Yard Company and the line-haul carriers or the Director General. There were no joint tariffs. Their relations were as separate in ownership, in operation, contract and tariffs as two common carriers could possibly be. The Yard Company was performing a service the line-haul carriers could not perform because not on their lines of railroad. The fact that the line-haul carriers could place the cars at the docks of the Yard Company does not alter such fact. They could not go on such docks or into the chutes or pens to unload or make delivery any more than one trunk line carrier could go on the rails of another at a point of physical connection without the consent of such other carrier.

The decision of this Court holding the Yard Company to be a common carrier and requiring it to file tariffs covering its charges was based on the separate and independent status of the Yard Company and on the service it was performing. Its transportation service was a part of the through transportation of the live stock from point of origin to destination in the sales pens of the consignee. The service was for the shipper and for his benefit. The Yard Company was a necessary link in such transportation. Without its facilities and service, the transportation and delivery could not be completed. The line-haul carriers had by their own independent tariffs provided for absorbing its charges in the amount of 25c per car for unloading and 50c per car for

loading, and had been paying such amounts pursuant thereto to the Yard Company, but when it increased its charges and the line-haul carriers refused to amend their tariffs and absorb the increased amount, it was bound to collect the same from the party for whom it performed the service. It could not collect from the line-haul carriers because their tariffs did not permit them to pay the increased amount and because their tariffs limited their carrier duty to transportation on their own lines and delivery to a connecting carrier, —the Yard Company.

That carrier's tariffs furnish the legal rate to be collected and the carrier is bound to enforce its tariffs is too well established to justify serious discussion, but see *Louisville & Nashville Railway Company vs. Maxwell*, 237 U. S. 94-97-8; *Keogh vs. Chicago & North Western Railway Company*, 260 U. S. 156-163; *Louisville & Nashville Railway Company vs. Central Iron Works*, 265 U. S. 59-65.

Loading and Unloading was a Transportation Service for which the Carrier Performing the Service was Entitled to Compensation and for Which the Shipper was Bound to Pay.

"Transportation," as defined in Section 1, Paragraph 3, of the Act to Regulate Commerce (49 U. S. C. A., Section 1, Paragraph 3, page 11), includes

> "all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery * * * storage and handling of the property transported."

In *Covington Stock Yards vs. Keith*, 139 U. S. 128-136, it is held that,

> "The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars and ends only after the stock is unloaded and delivered, or

offered to be delivered to the consignee if to be found at such place as admits of their being safely taken into possession."

The foregoing language was quoted with approval in *United States vs. Union Stock Yards*, 226 U. S. 286-304. The Yard Company was performing the service of loading, unloading and delivering the live stock, and for that reason was in the last mentioned case held to be a common carrier and required to file and maintain tariffs covering its charges for its services.

The Yard Company could not be required to perform such service without compensation. *C. M. & St. P. Railway Company vs. Wisconsin*, 238 U. S. 491. Since the Yard Company was performing the service, it was entitled to compensation therefor and was required to file and maintain tariffs covering its charges. It is difficult to understand how it could be guilty of a wrong in collecting the charge from the party for whom the transportation service was rendered and also difficult to understand how the Director General could be guilty of a wrong in inserting the Yard Company's charges in the composite bill of the Yard Company and the line-haul carrier covering the freight and unloading charges, such bill specifically stating the 25c charge to be that of the Yard Company and assessed under its tariff.

The decision of the Court in *Covington Stock Yards Company vs. Keith*, 139 U. S. 128, much relied on by petitioners, does not indicate a contrary conclusion. In respect thereto, the Circuit Court of Appeals well said:

> "The action was begun in 1886—before the passage of the Interstate Commerce law—and of course, was uninfluenced by published tariffs of a participant in interstate commerce, as is the case with the Chicago Yards. The situation was entirely different and in our judgment, the case has little, if any, application here." (R. 395).

The Covington Yards were on the rails of the carrier. They were established and maintained pursuant to a contract with the carrier by which they were made the depot of the carrier for receipt and delivery of live stock. The carrier furnished no other yards in Covington and agreed that it would not do so and would not permit anyone else to do so. Keith, prior to the making of the contract, was maintaining a stock yards on the carrier's line in Covington with loading and unloading platforms, chutes, etc., through which it had been receiving and delivering stock. The carrier had torn up the platforms and connections, and refused to longer receive or deliver stock thereat. The Covington Yards were making a charge for yardage on all stock received by Keith through such yards and he brought suit to compel the carrier to receive and deliver stock to him through his own yards and without going through the Covington yards. The Court held that he was entitled to the relief sought either in the way of receiving and delivering at his own yards, or if delivered through the Covington yards without being charged for yardage. It will be noted, however, that the Covington yards were established for the sole purpose of performing the loading and unloading, watering and feeding of live stock transported to or from Covington by the carrier. No question of maintaining a market for live stock was involved. No question of delivery of the live stock beyond the premises of the carrier was involved. The Covington yards was not a common carrier. It was merely furnishing a facility the carrier was required to furnish under a contract with the carrier, and the Court held that the carrier could not directly or through its agent charge the shipper for the use of a facility it was required to furnish.

The case is further conclusively differentiated from the case at bar by reason of the fact that the Stock Yards in this case were not on the line-haul carrier's rails; that the yards were the destination of the shipments by reason of being

for sale on the public market maintained by the Yard Company; that the line-haul carriers had trackage rights over the rails of the Junction Company permitting them to reach the yards, but no right to go upon the premises of the Yard Company, either to unload or to make delivery.

When the cars reached the docks, the line-haul carriers could do nothing further in the transportation of the stock. They had reached the end of their lines, the point of connection with another common carrier furnishing the facilities necessary to complete the transportation, which included unloading and driving to the sales pens, for which service the Yard Company published and maintained its own tariffs and which service was performed by the Yard Company's crews entirely upon its own property devoted to the public use and to the performance of the service on account of which it was a common carrier and required to file tariffs of its charges.

Surely the Circuit Court of Appeals was right in holding the decision in the *Covington* case is without application to the case at bar.

Petitioners also cite and rely on *Panhandle & S. F. Railway Company vs. Phillips*, 197 S. W. 1031, and *Panhandle & S. F. Railway Company vs. Crawford*, 198 S. W. 1079, decided by the Court of Civil Appeals of Texas in 1917. The stock was delivered to Kansas City Stock Yards, and delay in feeding and delivery to consignee after unloading was involved. The Court relied on the *Covington* case. There was no suggestion that the Kansas City Yards was a common carrier. There is no intimation in the opinion in either case that it had published tariffs covering its charges or services. The Court does state that the record is silent in reference to who pays the Yard Company for its services. The Yards were on the rails of the Railway Company and there was nothing to differentiate it from the facts in the *Covington* case. Such

decisions, therefore, are not in point and can have no application to the facts presented in the case at bar.

V.

THE INCREASED CHARGE OF 25c PER CAR WAS COLLECTED FROM THE SHIPPER BY THE YARD COMPANY, AND THE CIRCUIT COURT OF APPEALS CORRECTLY SO HELD.

On page 26 of their brief, petitioners challenge the foregoing proposition, notwithstanding their petition expressly alleges that it did so, the Commission so found and the undisputed testimony clearly establishes such to be the fact. In their petition (R. 13), petitioners expressly allege

> "that the shippers and receivers of live stock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company * * * an amount in excess of the former tariff charge, etc."

It is true the Director General is included with the Yard Company in such allegation. In its first opinion the Commission found:

> "The Stock Yard Company collected and retained such charges from the shippers." (R. 123).

The undisputed facts are that when the Yard Company increased its charges, the line-haul carriers refused to increase their absorptions and the Yard Company, in pursuance of its effort to escape its obligation as a common carrier and probably to make itself popular with its customers, the shippers, tried to force the line-haul carriers to increase their absorptions by the amount of its increased charges, and thus save the shipper from paying same. The Yard Company went so far as to hold out 25c for each car it loaded or un-

loaded from the freight charges collected for the line-haul carriers.. They protested and began to make arrangements to collect their own charges. As a result, an understanding was reached. The line-haul carriers had always made out their freight bills and turned them over to the Yard Company to collect. It was arranged between the Yard Company and the line-haul carriers that in making out their bills thereafter, they would add 25c, specifying same as a loading or unloading charge, as the case might be, expressly stating that same was assessed under the Yard Company's tariff. As so made out, the Yard Company through Mr. Chace, its Auditor, collected the charge from the commission men who paid it out of the shipper's money.

This arrangement was reached before the beginning of Federal Control, and the practice was in effect when the Director General took charge, and was continued during that period. Such facts were before the Commission and it was on such facts the Commission made the holding above stated. Prior to the development of this controversy, the Yard Company had billed the line-haul carriers monthly for their charges covered by the absorption tariffs of the line-haul carriers. They continued to do so after the foregoing arrangement was made. Instead of holding out the 25c collected under its tariff in remitting the collections of the freight charges, thus increasing the bookkeeping, it remitted the entire amount to the line-haul carriers and included the amount in their bill to the line-haul carriers at the end of the month.

The Circuit Court of Appeals rightly held under such facts that the charges were collected by the Yard Company. There is no dispute as to the facts, and we think both the Commission and the Court have placed the only logical construction thereon that seems possible. Adding the Yard Company's charge to the line-haul carriers' freight bill, expressly specifying that it was assessed under the Yard Company's tariff,

did not make such charge a part of the line-haul carriers' freight bill, but made the freight bill presented a composite bill including the charges of the line-haul carriers and the delivering carrier, (Yard Company). The Yard Company was bound to collect its tariff charges. It matters not that it was forced to do so by the refusal of the line-haul carriers to permit it to take their money to pay same. By being thus forced, it avoided a violation of the law both by itself and the shippers. The Yard Company accomplished such collection by procuring the line-haul carriers to insert the extra 25c charge the shippers were required to pay on their freight bills containing the express statement that they were charges assessed under the Yard Company's tariff for loading and unloading, and after the bills were so made up, the Yard Company actually collected the money from the commission men who paid it out of the shippers' funds in their possession.

VI.

THE MAKING AND COLLECTING OF A SEPARATE CHARGE FOR THE SERVICE OF THE YARD COMPANY IN LOADING AND UNLOADING THE LIVESTOCK WAS NOT AN UNLAWFUL OR UNREASONABLE PRACTICE AND SUCH FINDING OF THE COMMISSION IS WITHOUT SUPPORT IN THE EVIDENCE AND IS CONTRARY TO THE EVIDENCE AND ALSO CONTRARY TO LAW.

In its second opinion, 58 I. C. C. 164, (R. 145), the Commission announced its conclusion upon which the award sued on was made. Such conclusion is:

> "As the services of unloading and loading are part of the transportation of live stock, the collection of separate charges from the shippers for unloading or loading, in addition to the rates on live stock from and to interstate points to and from the stock yards was an unlawful and unreasonable practice."

It will be recalled the Commission at no time considered either the reasonableness of the Yard Company's charge or of the line-haul rate, nor the reasonableness of the sum of such rates, but based its conclusion upon the fact that the service of unloading and loading is a part of the transportation of live stock. A purely legal question is thus presented.

The entire charge for transporting the live stock from point of origin to destination in the Yards is made up of the line-haul rate and of the Yard Company's charge for its common carrier service. The charge of the line-haul carriers is stated separately from that of the Yard Company and in their own tariffs. The question presented is whether it is unlawful to so state the charges; that is, whether the charge of the Yard Company can lawfully be stated separately from the charge of the line-haul carriers. Paragraph 6, Section 1 of the Act to Regulate Commerce, (49 U. S. C. A., Section 1, Paragraph 6, page 12), in substance provides that it is the duty of all common carriers subject to the Act to establish and enforce just and reasonable classifications with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations affecting classifications, rates, tariffs, issuance, form and substance of tickets, receipts and bills of lading, etc.

Paragraph 7, Section 6 of the Act to Regulate Commerce, (49 U. S. C. A., Section 6, Paragraph 7, page 238), provides in substance that no carrier shall engage or participate in transportation of passengers or property unless the rates, fares and charges applicable have been filed and published in accordance with the provisions of the Act, and further provides that no carrier shall charge, demand, collect or receive a greater, less or different compensation for its services, and further that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facility except such as are specified in

its tariffs. Paragraph 1 of Section 6 of the Act to Regulate Commerce, (49 U. S. C. A., Section 6, Paragraph 1, pages 240-241, appendix 130) provides:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried and shall contain the classification of freight in force, *and shall also state separately all terminal charges*, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise shall affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper or consignee." (Italics ours).

In view of this provision, even in cases where place of delivery is on the line-haul carrier's rails, the stating of the terminal charges separately is not only permitted, but required. In cases, however, where the terminal services are performed by an independent common carrier not a participant in the line-haul carrier's tariffs, the stating of the charge separately is indispensable and is necessary in order that the carrier may receive compensation for its service, and in fact, in order that it may perform the service at all, since the provisions of the Commerce Act above referred to provide that the carrier shall not participate in the transportation unless and until its tariffs fixing its charges have been filed with the Commission. Having been filed, it is just as essential that the tariffs be enforced.

Such conclusion is indicated in the opinion of the Court in *Interstate Commerce Commission vs. C. B. & Q. R. R. Co.*, 186 U. S. 320. This case was in reference to the $2.00 terminal charge in effect at the time the shipments in controversy were made and which formed a part of the through rate from point of origin to the docks of the Yard Company.

Prior to 1894, the line-haul rate had included transporta-

tion to the Yards, but in that year because of the imposing of a trackage charge by the Junction Company for use of its tracks, the line-haul carriers established a $2.00 terminal charge in addition to their line-haul rates. The validity of such separate terminal charge was litigated by a shipper in a suit against the Atchison, Topeka & Santa Fe Railway Company to require it to deliver shipments of live stock at the Yards without making such separate charge. The Circuit Court in 64 Fed. 992, relying on its construction of *Covington Stock Yards vs. Keith,* 139 U. S. 128, granted the relief prayed for. The Circuit Court of Appeals, however, in 73 Fed. 753, reversed the Circuit Court, holding that it was proper to make the charge and to state the terminal charge separately. The matter thereafter came before the Interstate Commerce Commission on complaint of shippers, and the Commission, while finding the $2.00 terminal charge considered by itself reasonable and that the line-haul rate considered by itself was reasonable, ordered the carriers to modify their tariffs and to collect not to exceed $1.00 for the terminal charge. The question before the Supreme Court was the validity of such order. In its opinion the Supreme Court considers the question presented very fully, and same should be read at length.

As a result of such consideration, the judgment of the lower Court setting aside the order of the Commission was affirmed, thus upholding the separate terminal charge.

The matter was again before the Commission and it made a further order of like character which the Court again set aside in *Interstate Commerce Commission vs. Stickney,* 215 U. S. 98-104-105. In stating the case the Court said:

> "The controversy as to this terminal charge has been of long duration. A history of it antecedent to the present litigation is to be found in *Interstate Commerce Commission vs. C. B. & Q. R. R. Company,* 186 U. S. 320.
>
> "It is well to understand the precise question which is presented in this case. That question is the validity of

the terminal charge of two dollars per car. The report of the commission opens with this statement: 'The subject of this complaint is the so-called terminal charge of $2 per car imposed by the defendants for the delivery of carloads of livestock at the Union Stock Yards in Chicago,' and its order was in terms that the railroad companies be—'required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.'"

The Court further quotes from the Commission's order directing that after February 1, 1908, the terminal charge should not exceed $1.00 per car. The Court further said:

"The sixth section of the act known as the 'Hepburn Act,' (an act to amend the Interstate Commerce Act, passed on June 29, 1906, c. 3591, 34 Stat. 584), requires carriers to file with the commission and print and keep open to inspection schedules showing, among other things, 'separately all terminal charges * * * and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates.' By Section 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co. vs. St. Louis Hay Co.*, 214 U. S. 297. If the terminal charge be in and of itself just and reasonable, it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those

prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule the carrier must separately state its terminal or other special charge complained of, for if many matters are lumped in a single charge it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services. *The carrier is under no obligations to charge for terminal services.* Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The Commission in its opinion found that the terminal charge in itself was reasonable and also that the line-haul charge was reasonable, but still directed a reduction of the terminal charge from $2.00 to $1.00. In setting the order of the Commission aside, this Court on page 109 of the report said:

"Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

In the case at bar, there is no charge that either the line-haul carriers' rates were unreasonable or that the Yard Company's charge was unreasonable; nor any claim that the sum of such rates was unreasonable. The presumption must ob-

tain, therefore, that both were reasonable. If, however, the sum of such rates was unreasonable, the Commission could not correct the situation without investigating and determining that one factor or the other was unreasonable and should be reduced. The Commission could not, as a matter of "convenience," strike at the situation generally, and without determining or attempting to determine which carrier was charging more than it should, merely denounce the practice of charging the shipper separately for the unloading service.

In view of the language of the statute, it was proper to state the terminal charge separately, especially when the particular terminal charge involved was the only charge made by the common carrier performing the service covered by the charge. If the charge when stated separately, as required by the Act, was reasonable, it must be upheld by the Commission and the Court. Since its reasonableness is not attacked, the presumption is that it was reasonable and the Commission, in holding that the making of the separate charge was unlawful and unreasonable, committed an error of law which this Court must correct.

Where the terminal charges and the line-haul charges are stated separately, if the aggregate is unreasonable, the reduction must be in the factor making up the through rate which is unreasonable. Neither factor can be determined to be unreasonable, unless evidence is produced supporting such conclusion. The Commission, however, refers to the making and collecting of this separate charge as a "practice" which the Commission says is unreasonable and unlawful. Certainly a practice of complying with the law in stating the terminal charge separately and collecting the charge when provided for in tariffs is not unlawful. It is thus seen that where the terminal service is on the line of the line-haul carrier, it may charge therefor and may state the charge separately, and if it does charge for the terminal service, it *must* state such charge separately.

In the case at bar, however, we have connecting carriers, the line-haul carriers with their separate tariffs and separate charges covering transportation from point of origin in the country to the Yards. We also have separate tariff of the Yard Company, a separate and distinct common carrier covering its charges for the service it performs and for the use of its instrumentalities and facilities devoted to public use. Each tariff is for the service performed and the facilities furnished by the carrier filing the tariff. The tariff of neither covers any part of the service of the other. It is not the case of a joint tariff or a joint service, but of separate and distinct tariffs filed with and approved by the Commission, and covering the separate services and separate charges of each, and in neither case is the charge assailed as being unreasonable. It must be apparent the conclusion of the Commission is supported by neither fact nor law, that its conclusion is not supported by the evidence and constitutes an error of law which must be corrected by the Court.

VII.

NEITHER THE EFFORTS OF THE YARD COMPANY TO FORCE THE LINE-HAUL CARRIERS TO PAY ITS INCREASED CHARGE BY INSERTING IN PARENTHESES IN ITS TARIFF THE WORDS, "AS A CARRIER'S AGENT," NOR ITS ALLEGED ADMISSIONS CAN CREATE AN OBLIGATION ON THE LINE-HAUL CARRIERS TO PAY SUCH CHARGE OR CREATE A LIABILITY ON THEIR PART FOR THE COLLECTION OF SUCH CHARGES BY THE YARD COMPANY.

On pages 65 to 70 of petitioners' brief, it is urged that the Yard Company admits that it was the line-haul carriers' agent, and further urged that the record shows such agency. For such contention, petitioners rely on the words, "as a carrier's

agent," in parentheses in the Yard Company's tariff increasing its charges and the statements of officers of the Yard Company and its attorney in the course of the hearing. In the statements relied upon which are merely in the nature of admissions without testifying to any fact, petitioners omit the affirmative testimony both of Mr. Henkle, General Manager of the Yard Company, and Mr. Chace, Auditor of the Yard Company, that there was no contract between the Yard Company and the carriers respecting the loading and unloading of live stock, and that the tariff was filed without the consent or authority of the line-haul carriers, and omit reference to the testimony of the carriers that no such agency or authority existed. This testimony has already been definitely pointed out under Division I, Paragraph B, to which reference is made.

We know of no theory by which a common carrier by its own action, through a tariff or otherwise, may create a duty, obligation or liability upon another common carrier. We have already pointed out that the Yard Company filed its tariff without consent or authority of the line-haul carriers. They immediately protested against the idea that the Yard Company was their agent in filing the tariff or in performing its common carrier service. They refused to increase their absorptions and refused to pay the increased charge.

Unless we are to abandon the old-fashioned doctrine that the relation of principal and agent cannot be created by the mere act of the agent, we must conclude petitioners' contention is unsound. An agency can only be created through an agreement between the principal and agent, and the agency can extend only to those things covered by the agreement. Here there was no agreement. When the Yard Company pretended to be their agent, the line-haul carriers protested and petitioners were apprised of such protest and knew the alleged agency was unauthorized.

When the Director General took over the railroads, the

petitioners had for six months been paying the increased charge to the Yard Company from their shippers' funds. When the Director General came into the picture, the practice of placing the increased charge of 25c in the freight bills with specific reference to same being assessed under the Yard Company's tariff had long been established, and he continued such practice. The alleged agency had not only been repudiated by the corporate line-haul carriers, but they with the Yard Company had for six months been ignoring the thought of agency. The composite bill of the line-haul carriers and the Yard Company was paid in one check to the Yard Company. The absorption tariffs of the line-haul carriers provided for paying 25c of the unloading charge to the Yard Company. It had never been the practice of the Yard Company to withhold such amount from the collections for the line-haul carriers, but on the contrary, the entire collections were remitted weekly, and monthly bills were rendered by the Yard Company for the amount to which it was entitled. This was a bookkeeping convenience and was a practice not covered by any express agreement, but acquiesced in by the parties.

After the increased charge was included in the composite bill of the line-haul carriers and the Yard Company, the practice was continued of remitting the entire collection and presenting monthly bills for the entire amount the Yard Company was entitled to. This practice was in effect when the Director General took charge and was continued.

Any thought of agency based on the tariff or otherwise was being ignored long before the Director General came into the picture and was continued to be ignored during all of the time involved in this suit. The method of handling the funds after the collection was made by the Yard Company was a matter between the Yard Company and the Director General and did not affect the relation of either to the shipper or to petitioners. The methods adopted by which the Yard

Company ultimately received its entire charge do not create any liability on the part of either the Director General or the Yard Company to petitioners or to the shippers.

In view of the fact that the provisions of the Act to Regulate Commerce, to which reference has been made in other divisions hereof, required a carrier to file tariffs of its charges before participating in transportation, and to enforce its tariffs after being filed, it is difficult to understand how the unauthorized insertion of the words, "as a carrier's agent" could excuse the Yard Company from collecting its charge or the party for whom its service was performed from paying such charge. In view of the law, it would seem such language would be treated as surplusage.

The words "as a carrier's agent" have been shown to be a misstatement of fact. Such misstatement of fact should not invalidate the tariff and certainly should not create a liability on the line-haul carriers. The line-haul carriers did not permit such misstatement to go unchallenged, but at once repudiated the same, and long before Federal control, shippers knew of such repudiation and were paying the charges to the Yard Company. If the shippers were damaged by the misstatement, their remedy, if any, would be against the party committing the wrong. They were not, however, damaged or affected by such misstatement in respect to any shipment in controversy. They knew of the misstatement long before any shipment in controversy was made. They did not rely on such statement in making any shipment in controversy. The shippers paid for a service rendered in their behalf the same amount they would have been required to pay for such service if the words "as a carrier's agent" had not been included in the tariff.

Such language did not authorize shippers to understand the charge was imposed upon the line-haul carriers. The inference to be drawn from such language, had it not been challenged, was that the charge was being imposed on the

shipper by the Yard Company acting as agent of the line-haul carriers; i. e., the tariff was really a tariff of the line-haul carriers published by the Yard Company as their agent. Since the Yard Company did not act as agent of the line-haul carriers, either in publishing the tariff or in enforcing it by collecting the charges imposed by it, such language could impose no liability on the line-haul carriers or the Director General. That consent of all carriers who are to be governed by a tariff is necessary, is shown by the provisions of Section 6, Paragraph 4 of the Act to Regulate Commerce (49 U. S. C. A., Section 6, Paragraph 4, page 281, Appendix 131) which provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof, as may be required or approved by the commission * * *."

We have already shown that the tariff of the Yard Company names no carrier except itself; that the files of the Commission show no concurrence therein by any line-haul carrier. The tariff can, therefore, affect only the Yard Company and the persons for whom it renders the transportation service for which its charges are made. Tariffs, we think, are authorized only for the purpose of fixing the duties and obligations of the carrier filing the same, of other carriers who join therein in the manner provided by the Act to Regulate Commerce and the shippers utilizing the services and facilities covered thereby.

Such was the thought of the Commission, we think, in its proceeding against the Yard Company to require it to file its tariffs and of the Court in making such requirement. In complying with the Court's order, the Yard Company filed its tariff without any suggestion of agency. In increasing its charges, such suggestion was for the first and only time con-

tained in a tariff of the Yard Company. Its status as a common carrier had not changed in the meantime. Its relations with the line-haul carriers had not changed in the meantime. Its relations with the shippers had not changed. The misstatement in its tariff was unauthorized by the law, unauthorized by the Commission and unauthorized by the line-haul carriers, and became and was mere surplusage. If such is not the case, the consequences must rest on the Yard Company, who attempted the unauthorized thing, and not on the line-haul carriers who neither participated therein nor profited thereby.

VIII.

CONGRESS DID NOT CONSENT THAT THE AGENT APPOINTED BY THE PRESIDENT MIGHT BE PROCEEDED AGAINST BEFORE THE INTERSTATE COMMERCE COMMISSION FOR A TORT, BUT ONLY FOR DAMAGE RESULTING FROM THE "COLLECTION OR ENFORCEMENT BY OR THROUGH THE PRESIDENT DURING THE PERIOD OF FEDERAL CONTROL OF RATES, FARES, CHARGES, REGULATIONS AND PRACTICES."

On page 19 of petitioners' brief, at the very beginning of their argument, they state:

> "The underlying fundamental proposition in this case is that it is an action in tort brought against respondents as joint tort-feasors, etc."

This is a proceeding against the United States. Such proceedings may be brought only because of and strictly in accordance with the consent of Congress. (*Davis, Agt. vs. Donovan*, 265 U. S. 257-263). The only consent to proceed against the Agent appointed under Section 206-A, Transportation

Act of 1920 before the Interstate Commerce Commission is contained in Paragraph C of such Section, (49 U. S. C. A., Section 74, page 357). Such provision is as follows:

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations or practices (including those applicable to interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustifiably discriminatory or unreasonably prejudicial, or otherwise, in violation of Chapter 1 of this title may be filed with the Commission within one year, etc."

In order to be within the jurisdiction of the Commission and within the consent of Congress, the complaint must be on account of "the collection or enforcement of rates, fares, charges, regulations or practices" by the Director General. The charge involved here was one imposed under a tariff of the Yard Company in which no railroad under Federal control participated. The Yard Company was not under Federal control. It was the Yard Company's tariff and the Yard Company collected the charge. That the charge was collected pursuant to the Yard Company's tariff, there can be no question. The Yard Company sought to withdrawn its tariff, but the Commission refused to permit it to do so and forced it to continued the tariff in effect. C. C. Chace, Auditor of the Yard Company, testified:

> "Q. Do you know under what authority the loading and unloading charges were collected or assessed?
> A. On the authority of the Stock Yards tariff." (Defendant's Exhibit 9, page 181).

General Manager Henkle of the Yard Company testified that if the Commission would permit the Yard Company to cancel its tariff containing the charge complained of, the

Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342).

The real purpose of the Commission, as we understand, although not directly stated in its opinion, was to require the Director General to absorb the increase in the Yard Company's charges. We are treating this subject under another division and at this time merely wish to point out that the statute did not authorize the filing of a complaint with the Commission after Federal control ended on account of the failure of the Director General to do something during Federal control, but only because of the collection or enforcement of rates, fares, charges, regulations or practices.

The failure to increase the absorptions of the line-haul carriers was not the enforcement of a practice, nor was it the collection of a rate. The Director General did not collect a rate at all; did not establish the rate complained of. He merely refused to increase an absorption. The Yard Company established the rate, collected it and retained it as compensation for a service which it rendered, the value of which is not questioned; nor is it contended that the Yard Company was not entitled to compensation for what it did. Congress never intended to give the Commission authority after Federal control ended to sit in judgment and award damages because of the thousand and one things which the Director General might have done, but in his wisdom and judgment did not do. Authority to impose liabilities on the Government for torts committed by the Director General was not given to the Interstate Commerce Commission. Petitioners contend the Director General was a joint tortfeasor. Whether because he did not increase his absorptions or because of participating in making the bill which the Yard Company collected, is not clear. That the Director General did not collect the charge and did not receive the benefit of it is found by the Commission in its first opinion from which it has never receded. The language of such finding is:

"The Stock Yard Company collected and retained such charges from the shippers." (R. 123).

If the failure to increase his absorptions is not a tort for which the Agent may be held in a proceeding before the Commission, then if there is any liability on the theory of a tort, it is participating in the making out of the bill for the freight charges in which was inserted the 25c additional charge of the Yard Company with a specific reference in the bill to the Yard Company's tariff and statement that the charge is made under such tariff. The making out of the bill was the only act in which both the Yard Company and the Director General participated. There was no joint participation in failure to increase absorptions. The Yard Company was attempting to force an increase in the absorptions and the Director General refused to do so. The joint tort, therefore, if any, must be in respect to the making out of the bill covering the charges. No complaint is made of the freight charge, and we must therefore assume that the putting of the additional 25c charge for unloading on the bill and the collecting of it constitutes the alleged joint tort. In that sense, the Director General assisted in the collection by the Yard Company, but such assistance is not an act for which the Commission was given jurisdiction to impose a liability on the Director General. Whichever view may be taken, the Commission was without jurisdiction to make the award against the Director General and its action in attempting to do so is absolutely void.

IX.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS FURNISHED THE MEASURE OF THEIR OBLIGATION AND LEGAL RIGHT TO CONTRIBUTE TO THE PAYMENT OF THE YARD COMPANY'S CHARGES.

What we have said under Divisions IV and VI hereof as to duty to file and strictly abide by tariffs is equally applicable here. We call special attention, however, to Paragraph 6 of Section 1 and Paragraph 7 of Section 6 of the Act to Regulate Commerce, (49 U. S. C. A., Section 1, Paragraph 6, page 12; and Paragraph 7, Section 6, page 237, appendix 130, 131), which require carriers subject to the Act to *establish, observe and enforce* classifications of property for transportation with reference to which rates are established, and to provide therein rules and regulations applicable to and the form and substance of tickets and shipping contracts, and which prohibit the engaging in transportation until such classifications and tariffs are filed, and which require all concessions to shippers to be expressly stated therein.

For convenience we again quote such paragraphs:

> "It is made the duty of all common carriers, subject to the provisions of this Act, to establish, observe and enforce just and reasonable classifications of property for transportation with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts and bills of lading * * * etc." (Section 1, Paragraph 6, appendix 130).

> "No carrier * * * shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provi-

sions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariffs filed and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*" (Section 6, Paragraph 7 appendix 131. Italics ours).

Pursuant to such provisions, the line-haul carriers filed their tariffs fixing their rates for transportation, which limited the transportation to the carrier's own line with delivery to a connecting carrier if destined beyond the line of the originating carrier. Unless a provision is contained in the tariffs authorizing the absorbing of the rate in whole or in part of the connecting carrier, the originating carrier would not have a legal right to do so. In order to absorb a switching charge, an unloading charge, or any other charge of a connecting carrier or other agency, the tariffs of the carrier must expressly provide therefor.

The concluding language of Paragraph 7 of Section 6, which we have italicized, can have no other meaning. The line-haul carriers, therefore, could not relieve the shipper of the duty of paying the increased charge of the Yard Company without providing in their absorption tariffs that they would do so. They were not permitted to collect a charge not provided for in their tariffs, nor were they permitted to refund to the shipper any part of the tariff charge unless specified in the tariffs. To pay the Yard Company for its services anything in excess of that provided in their absorption tariffs would be a violation of the Act. If the Commission had found that the rates were high enough to warrant absorbing the increase charge and that discrimination

would result on a failure to absorb it, the Commission had authority to direct the carriers to increase their absorptions 25c per car (assuming jurisdiction had been obtained by a full compliance with the statute), and in such event to authorize reparation in reference to past transactions, but the Commission did not attempt to authorize an increase in the absorptions.

This is conceded by petitioners on page 25 of their brief, where they state:

> "The question as to whether line-haul carriers should have absorbed the increased charges of the Yard Company is not involved."

Without considering the question of whether absorptions should have been increased, the Commission merely condemned the collection of the increased charge as an unreasonable and unlawful practice and undertook to order reparation against both the Yard Company and the line-haul carriers without determining that the Yard Company was not entitled to compensation for its service and without determining that the line-haul carriers should increase their absorptions.

In view of the fact that the Yard Company was obliged to enforce its tariff and collect its charges, that no finding of unreasonableness and no direction or permission to the Yard Company to cancel its charges were made or given, that the line-haul carriers were obliged to abide by their tariff provisions and could not increase their absorptions without amending their tariffs, that the Commission did not direct an amendment to their tariffs to increase absorptions and could not do so under the evidence, the making and collection of the charge was neither unreasonable nor unlawful, was not a practice, but the enforcement of the tariff which the Yard Company was legally bound to enforce. The situ-

ation, therefore, furnished no basis for the Commission's award and same must be set aside by the Court.

X.

THE DECISION OF THE DISTRICT COURT THAT THESE PETITIONERS HAD NO RIGHT TO MAINTAIN THIS ACTION WAS CORRECT.

The Interstate Commerce Commission has filed a brief as *amicus curiae* and seeks to have this court review the decision—not of the Court of Appeals—but that of the District Court notwithstanding that in view of the action of the Court of Appeals these petitioners were in no way prejudiced by said decision of the District Court.

Assuming, however, that this court may, nevertheless, determine to review the decision of the District Court, we beg to submit that under the evidence and under the decisions of this court, said decision was justified.

The decision of the District Court was based on the proposition that the petitioners—plaintiffs below—(hereinafter referred to as plaintiffs) had failed to show that the alleged wrongful act of the respondents—defendants below—(hereinafter referred to as defendants) had subjected them to any pecuniary loss. On the contrary the undisputed evidence affirmatively showed that no such loss had been incurred by them. The suit was to recover damages for an alleged tort. Its purpose was to compensate plaintiffs for an alleged loss suffered by them—to be made whole—for an alleged unlawful exaction of a charge for services rendered by defendants in *completing the transportation of live stock.* That is, for moving said live stock from the cars across the platforms

and through the yards into the proper pens for delivery. (1)

As heretofore stated, the plaintiffs were 103 live stock commission men located at the Union Stock yards, Chicago; they were the consignees of shipments of live stock which they sold on commission and when sold remitted the proceeds of sale to the consignors after deducting various charges, among others, the charge in question—thereby making themselves whole for the charges so advanced to the defendants. (Opinion of the Commission R. 151).

The sole question presented is—Can a consignee who pays an unlawful charge to the carrier out of the funds of the consignor, or who before complaint made has been fully reimbursed by the consignor for such outlay, recover from the carrier in his own right the amount so paid by him?

The Interstate Commerce Commission has held that he may recover and the District Court held he could not.

Mo. Portland Cement Co. vs. Director General, 88 I. C. C. 492.
Adams & Kitchen, et al v. Mellon, 39 Fed. (2d) 80.

The order of the Commission is dated December 12, 1927, and is as follows:

> "It appearing, That on February 11, 1919, the Commission entered its report, and on July 15, 1920, and June 2, 1925, its reports on further hearings in the above entitled proceedings, which reports are hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing,

(1) The order of the Commission is based on its finding of law that the unloading charge was an additional charge to that for transportation, and hence, unlawful, yet it held that the service of unloading was a transportation service (58 I. C. C. 167)—the transportation not having ended until the live stock were placed in the proper pens. (Covington Stock Yds. v. Keith, 129 U. S. 126; U. S. v. Union Stock Yds. 226 U. S. 286). If the service was a transportation service, the charge was a transportation charge and was a component part of the through transportation charge (rate) and not a separate charge therefrom and hence was not unlawful for the reasons stated by the Commission.

among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest." (R. 157-158).

(Then follows a long list naming the plaintiffs in the District Court with the amounts set opposite their respective names.)

Then follows:

"It Is Therefore Ordered, That the defendants named in each of the groups shown in the above table be, and they are hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before January 26th, 1928, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of the unlawful collection of separate charges, in addition to the line haul rates, for loading and unloading of interstate shipments of ordinary live stock, in carloads, at the Chicago Stock Yards." (R. 208).

Paragraph 2 of the plaintiffs' petition filed in the District Court is as follows:

"The following named plaintiffs are, and each of them is, named in an order of the Interstate Commerce Commission entered the 12th day of December, 1927, as being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission, a copy of which is hereto attached as Exhibit "A", and made a part hereof to the same extent and as fully as though the same were here set out; the following named are the plaintiffs herein and *are the parties entitled to receive the damages awarded by the Interstate Commerce Commission.*" (R. 4). (Italics ours).

(Then follows the names of the parties contained in the order of the Commission.) (R. 4).

In their brief filed in this court, the following statement is made:

> "Petitioners brought suit as plaintiffs in the District Court to recover damages on a claim predicated on an order of the Interstate Commerce Commission awarding reparation in the sum of $140,001.25 *in favor of petitioners* and against the Director General of Railroads of the United States and the Union Stock Yard & Transit Co. jointly and severally." (Br. 2-3) (Italics ours).

That the award was made to the plaintiffs in their own right not only appears from the language of the order, but that it was so understood by counsel for plaintiffs is shown from the foregoing extracts from their petition in the District Court and brief filed in this court.

In the Commission's report of June 2, 1925, the following statement is made:

> "While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, *this would not affect the right of the complainant consignees to awards of reparation.*" (R. 151). (Italics ours).

It is true that in this same paragraph the Commission also said:

> "They (commissionmen) seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers *and also as factors and agents for and on behalf of the live stock shippers who were the consignors.*" (R. 151). (Italics ours).

In view of the foregoing finding had the Commission seen fit to do so it might have made the award to the complainants in their representative capacity as factors and

agents of the consignors, but in the order on which the suit was based no mention is made of the consignors, nor was it stated in said order that the defendants were to pay the award to—or that the complainants were to receive—the payments in any representative capacity. The Commission could not make the award to the plaintiffs in their own right and also in their representative capacity. It had to be made to them either in their own right or as representatives of the shippers.

Even after the order was made had the complainants desired to have the award made to them in their representative capacity, the Commission undoubtedly upon request would have so amended the order, but in view of what the Commission had said in its report of June 2, 1925 that the fact that complainants had been reimbursed by the shippers for the money advanced by the commission men in paying said charges "would not affect their right to awards of reparation", and the complainants, therefore, were willing to accept the award as made, relying on the correctness of the doctrine announced by the Commission in the *Missouri Portlant Cement* case, *supra.*

The complainants further relying on the correctness of that principle brought suit in their own individual names and right in the District Court. That court in its opinion saying:

> "The plaintiffs are 103 commission men, members of the Chicago Live Stock Exchange. The action is brought in their individual names. It is not, and does not purport to be, brought in any representative capacity. The plaintiffs do not sue as assignees as was done in the case of *Spiller vs. A. T. & S. F. Ry. Co.*, 253 U. S. 117, 64 L. Ed. 810." (R. 66).

That the Commission in making this award to the plaintiffs in their own right did so under the doctrine announced in their decision in the *Missouri Portland Cement* case,

supra, is clearly shown from the following statement of Commissioner Hall found in the report of the Commission of June 2, 1925, 100 I. C. C. 266, viz.:

Hall, Commissioner, concurring:

> "I join in the award of reparation to those complainants only as constrained thereto by the decision of the majority in *Missouri Portland Cement Co. v. Director General*, 88 I. C. C. 492, and am authorized by Commissioners Esch, Lewis and Cox to say that their participation in the award is under the same constraint." (R. 147, 156).

That counsel for plaintiffs understood that the order of the Commission ran to the plaintiffs in their own names and right is indicated by the following answers he made on the hearing before the Commission, viz.: in response to an inquiry of Mr. Towner, representing the Stockyard Co. directed to Mr. Hillyer, counsel for complainants, appears the following: (Defendant's Exhibit 9, page 236):

> "I had better correct your impression of that right of agency, Mr. Towner, because that is not the basis of our case at all. The basis of our case is that these people have a legal right to collect this money under the decisions of the Commission and the courts, and that it is not necessary for them to disclose here what they are going to do with it after they get it."

Mr. Towner replied to such statement:

> "Is it your theory, for my information, that these complainants would have the legal right not only to recover reparation, but to retain it?"

And Mr. Hillyer answered "Yes".

On the trial of said case and at the conclusion of all the evidence, a motion for a directed verdict having been made, the District Judge stated:

"It is apparent that the plaintiffs, commissionmen, have no legal interest in this proceeding. They are purely volunteers. They have adopted themselves as convenient agents to secure the recovery. They are not the ones who have been damnified by the imposition and collection of the excessive charge. The court holds that the plaintiffs in said case cannot maintain this motion (action). It must follow, and it is the ruling of the court, that the motions to direct a verdict made by the defendant; Andrew W. Mellon, Director General as Agent, etc. and a similar motion made by the Union Stockyard & Transit Co., defendants, be and each of them is allowed. The court will instruct the jury to find the issues for the defendants." (R. 77).

In the course of its opinion the Court of Appeals said:

"The action does not purport to be brought by appellants otherwise than in their respective individual capacities. Indeed, with attention directly challenged to their right to sue, it was contended by their counsel that they had such right, and while most likely the shippers would have the benefit of any recovery, this was wholly within appellants' volition." (R. 394).

The Court of Appeals further said:

"In the District Court's opinion Judge Woodward discusses the Interstate Commerce Commission decisions, and many others, particularly *Southern Pac. Co. vs. Darnell-Taenzer*, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, and *Louisville & N. R. Co. vs. Sloss-Sheffield*, 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242, reaching the conclusion that appellants in their own right may not maintain the suit.

Our examination of this question does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our deciding the appeal upon ground so formal and technical, if a proper result may be reached upon the merits of the cause.

In considering appellants' motion made after judgment had been entered, for reopening the case and permitting amendment to be made to the declaration to the end that the plaintiffs may maintain the action as trustees for the various shippers, evidently the ground upon which the court had directed the verdict was again questioned. The court then said: 'While the court, in its opinion, did not advert to the other points argued by the defendants, yet it seems to the court that on other grounds, not referred to in the opinion, the judgment of the court may be maintained.' In our view of the case, there are other grounds on which the judgment may be rested.

It would greatly transcend the reasonable scope of such an opinion to present discussion of all of the many propositions put forward by the parties in the 700 printed pages of briefs and arguments submitted to us. Our further comments will relate to the merits of the reparation claims, *without regard to the right of appellants to maintain the action therefor.*" (Italics ours).

Only Error Which May Have Resulted in Prejudice can Justify Reversal of a Judgment.

Camp vs. Gress, 250 U. S. 308, 317.
Y. & M. V. Ry. vs. Mullins, 249 U. S. 531.

The Court of Appeals after referring to the statement of the District Court that its judgment might have been maintained on other grounds presented by defendants, concurring therein, proceeds to consider the case on its merits without regard to the right of the plaintiffs to maintain the atcion, thereby in effect overruling the grounds upon which the action of the District Court was based. Hence, we are unable to see how the plaintiffs, petitioners here, were prejudiced by the reasons given by the District Court in reaching its decision.

In *Yazoo & M. V. R. Co. vs. Mullins*, 249 U. S. 531, 532-533, this court said:

"It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, *Fidelity & Deposit Co. vs. Courtney*, 186 U. S. 342, 351; *West vs. Camden*, 135 U. S. 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; *Seaboard Air Line Railway vs. Moore*, 228 U. S. 433, 435; *United States vs. One Distillery*, 174 U. S. 149, 151; will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby."

The Party Entitled to Recover Reparation is the One Who Paid and Bore the Charges on Account of Which Recovery is Sought and Who Has Been Damaged Thereby.

The plaintiffs' cause of action arises under Sections 8 and 16 of the Interstate Commerce Act. Section 8 of said Act (24 Stat. L. 379) provides for the civil liability of common carriers for damages caused by violation of any of the provisions of the Act, to wit:

"Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."

Section 16 of said Act among other things provides that:

"If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the District in which he resides * * * a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises."

Reparation, as the word is used in the field of Interstate Commerce Law, was defined in *Southern Pine Lumber Co.* case, 14 I. C. C. 195, 197, as follows:

"Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort. Bouvier defines 'reparation' as 'damages for an injury, amends for a tort.' If an injury is sustained on account of violation of law, the proceeding is in its nature *ex delicto*, and therefore, carries with it none of the features or incidents of an action *ex contractu*."

In *Penna. R. Co. vs. International Coal Company*, 230 U. S. 184, it is said at page 200:

"On the civil side, the act provided for compensation, not punishment."

In *Spiller vs. A. T. & S. F. Ry. Co., et al.*, 253 U. S. 117, this court said at page 135:

"A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty, but for compensation."

The suit of *Parsons vs. C. & N. W. Ry. Co.*, 167 U. S. 447, was an action brought in the Circuit Court of the United States to recover of the defendant $1,550.00 on account of alleged violations of the Interstate Commerce Act. In the course of the opinion the court says, page 460:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

"We think, therefore, without attempting to take judicial knowledge of the general order made by the Interstate Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in

that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act."

See *Penna. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184.

The Court of Appeals in *Lehigh Valley R. Co. vs. Meeker*, 211 Fed. 785, in referring to Section 8 of the Act said:

"It is not a *general* liability that is imposed by the act, but a particular liability to the person injured 'for the full amount of damages sustained in consequence of any violation of the provisions of the act'."

In *Lehigh Valley R. Co. vs. Meeker*, 236 U. S. 412, this court held that the finding of the Commission as to the amount awarded as reparation represented *prima facie* the claimant's *actual pecuniary loss*, and that in the absence of evidence to the contrary this rebuttable presumption would become conclusive. (Italics ours).

In this same case in speaking of what findings the act requires the Commission to make in a complaint for reparation, the court says *inter alia*, page 428:

(5) "Whether if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; * * *"

(7) "Whether if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages."

In *Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co.*, 20 I. C. C. 43 cited by this court in *Baer v. D. & R. G. Ry.*, 233 U. S. 479 the Commission said:

"* * * It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is es-

sential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another."

In *Knudsen vs. Mich. Cent. R. R.*, 148 Fed. 968, 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that:

> "To support a recovery under this section there must be a showing of some specific pecuniary injury."

In *Mills vs. Lehigh Valley R. R. Co.*, 238 U. S. 473, 481-482, this court said:

> "What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole, to be compensated for a loss because of an illegal unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. * * * When the Commission has found that there was damage to a specified extent *prima facie*, the damage is shown."

The Order of the Commission in this Case is Based Upon a Prior Holding of the Commission in the Case of Missouri Portland Cement Co. vs. Director General of Railroads, 88 I. C. C. 492 (Opinion of District Court, R. 68).

For many years prior to the decision in the *Missouri Portland Cement* case, *supra*, the Commission had uniformly held that the party entitled to recover reparation was he who had paid and borne the freight charges for the transportation service, but in the *Portland Cement* case, the Commission reversed its former decisions and held that the fact of who actually bore the charges was immaterial; that the sole question was as to who *physically* paid the charges

to the carrier; that such party was entitled to recover reparation (damages) although he has suffered no loss.

The facts in said case and the conclusion reached by the majority of the Commission is well stated by his Honor Judge Woodward in the District Court in his opinion in the case at bar, 39 Fed. (2d) 81-82; viz.:

> "In the *Missouri Portland Cement Co.* case it appeared that carloads of sand were sold F. O. B. complainant's plant at Memphis, Tenn., and consigned to various consignees at different points. The complainant prepaid the switching charges, but admitted that by separate invoices it subsequently collected from the consignees the amount so paid. The complainant contended that it paid, and, as between it and the defendant, bore the charges on these shipments, and that it is a proper party to bring the proceeding. The Commission say: 'Defendant in reply cites numerous cases in which we have held that the party who actually bore the charges, as such, is the only one entitled to recover. Defendant's statement of our practice in the past is accurate.'
>
> "Under the above state of facts, the Commission held that the complainant, the consignor, although the excess charges were actually paid by the consignees, was the party injured and was entitled to recover reparation. The holding in the *Missouri Portland Cement Co.* case is explained by the Commission in the late case of *California Fruit Exchange vs. American Railway Express Co.*, 155 I. C. C. 105, at page 107, as follows: 'Contentions similar to those advanced by defendants here were advanced in *Missouri Portland Cement Co. vs. Director General*, 88 I. C. C. 492 * * *. Therein we found that in determining who is entitled to reparation it is not necessary to *go beyond the first step; that the first step is taken when the freight charges are paid; and that the fact that whoever paid in the first instance suffered no ultimate damage is not of controlling importance.* In the absence here of the consignors who finally bore the charges, the inquiry need not extend further than to determine who paid the charges in the first instance.'" (Italics ours).

"Such holding, as the commission says in its report, reversed a long and uninterrupted series of decisions holding to the contrary. In the case of *Sloss-Sheffield Steel & Iron Co. v. L. & N. R. R. Co.*, 40 I. C. C. 738, 740, the commission summarizes its holdings in the following language:

> 'The Commission has held without exception that where freight charges are paid by consignees but are charged back to the consignors, the consignees are not entitled to reparation. *Mountain Ice Co. vs. D. L. & W. R. R. Co.*, 21 I. C. C. 45; *Commercial Club of Omaha vs. A. & S. R. Ry. Co.*, 27 I. C. C. 302; *Traffic Bureau, Sioux City Commercial Club vs. A. & S. R. R. R. Co.*, 37 I. C. C. 353; and other cases.
>
> 'In *Hygienic Ice Co. vs. C. & N. W. Ry. Co.*, 37 I. C. C. 384, the Commission held that the party entitled to reparation is the one who finally bore the freight charges.
>
> 'In *Oden & Elliott vs. S. A. L. Ry.*, 37 I. C. C. 345, the Commission held that the party entitled to recover is he who has either by himself or by another paid and borne the freight charges for the transportation service, and that the ultimate test as to who shall recover is the bearing of the freight charges for the transportation service.'

"If this case were decided in accordance with the earlier holdings of the commission, it is clear that plaintiffs cannot maintain this suit. If, on the other hand, it is to be decided in accordance with the holding of the commission in the *Missouri Portland Cement Co.* case, and forty or fifty similar holdings since the decision in that case, then the plaintiffs are the proper parties to maintain this suit."

The reason given by the Commission for its departure from its former rulings for many years, is stated thus in *Mo. Portland Cement Co., supra*, on pages 493-494:

"Defendant in reply cites numerous cases in which we have held that the party who actually bore the charges, as such, is the only one entitled to recover."

"Defendant's statement of our practice in the past is accurate. For example, in *Oden & Elliott vs. S. A. L. Ry.*, 37 I. C. C. 345, 348, we said that 'the party entitled to recover is he who has either by himself or by another paid and borne the freight charges for the transportation service, irrespective of the title to the property shipped.'"

* * * * * * * * *

"The decision of the Supreme Court in *Southern Pac. Co. vs. Darnell-Taenzer Co.*, 245 U. S. 531, however, has led us to re-examine this question and consider whether or not we are, as a matter of law, required to confine awards of reparation to parties who actually bore the charges as such."

* * * * * * * * *

"It is the reasoning which the court employed in reaching its conclusion which is of significance and importance in the present proceeding. Briefly, the case arose out of our decision in *Burgess vs. Transcontinental Freight Bureau*, 13 I. C. C. 668. We there found that the rate charged on hardwood from eastern points of production to the Pacific coast had been unreasonable and awarded reparation. Complainants were the consignors of the lumber and it appeared that they had sold f. o. b. destination. The consignees paid the freight charges on delivery and deducted those charges in making settlement with the shipper for the lumber. Complainants, therefore, *actually bore* the freight charges as such, as we have used that expression, unlike complainants here in the case of the 71 carloads above mentioned. * * * Defendants in the *Burgess* case above cited urged that although complainants had paid and borne the freight charges as such, they had not been injured, *inasmuch as they had passed those charges on to the consumer in the price for their lumber.*" (Italics ours).

On page 495, the Commission further says:

> "Here, also, the consignor is the complainant, but it paid the freight charges in the first instance and subsequently collected them by separate invoices from the consignees. But the Supreme Court has said that the 'general tendency of the law, in regard to damages at least, *is not to go beyond the first step,*' that 'plaintiffs suffered losses to the amount of the verdict *when they paid*', and that 'their claim *accrued at once* in the theory of the law and *it does not inquire into later events.*' Two things are clear. One is that the fact that complainant suffered no ultimate damage is not of controlling importance. In the *Darnell-Taenzer* case plaintiffs transferred the damage to the consumer through the selling price of the lumber. Here complainant transferred it to the consignees through separate invoices, and doubtless it finally reached the consumer. * * * This leads directly to the second point which is clear, and that is that the consignees from whom complainant collected the charges by separate invoices paid the charges and could have maintained an action for recovery, for in the *Darnell-Taenzer* case the charges were paid by the plaintiffs in a similar manner. * * * Conceding that here the consignees bore and 'paid' the freight charges as such, did the complainant also pay within the meaning of the court?"

To this conclusion of the majority of the Commission, there was a vigorous dissent by four of the Commissioners. Commissioner Hall dissenting, said pages 497-498:

> "The majority find, with respect to the 71 shipments described, that complainant was damaged solely because it paid the freight charges found to have been unreasonable, notwithstanding the admitted fact that it passed those charges along, as such, to the consignees who thus *bore* them and who are not parties to this proceeding. That finding professes to follow the principle declared in *Southern Pac. Co. vs. Darnell-Taenzer Co.*, 245 U. S. 541, which, when the facts before the Supreme Court are examined and considered, is complete authority for a finding to the contrary. If the Supreme

Court had applied the expression 'later events' as the majority does here its judgment would have been against, rather than in favor of, the consignors in the *Darnell-Taenzer* case.

Complainant (consignor) here stands in the same position as the purchaser (consignee) in the *Darnell-Taenzer* case, of whom the Supreme Court said that 'the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid the increased price'. Clearly the term 'paid' in the sense used by the court contemplated also the *bearing* of the freight charges, since there it was the purchaser who in the first instance paid the charges to the carrier. Here the 'first step' takes us to the consignees who 'proximately * * * suffered losses * * * when they paid'.

"When an unreasonable rate is exacted the interstate commerce act gives to the 'person or persons injured thereby' the right to file complaint with us. We have in such cases consistently found that the person 'injured' is the one who *bears* the freight charges, as such, and I see no reason for a different conclusion here. When this complainant passed along the charges to the consignees, who also were 'in relation with' the carrier, it completely eliminated any possibility of damage to itself, irrespective of what the measure of the rate might have been. How then does its position become changed when we later determine that the rate which it paid, but which it did not bear, is unreasonable? It has lost nothing, and has not been damaged, but by the majority's findings it is designated as the beneficiary of a sum of money which it may keep as compensation for the mere act of advancing the freight charges to the carrier.

None of the cases cited as authority for the text quoted from 21 Ruling Case Law, 902, in the majority's report dealt with an alleged unreasonable rate on shipments. * * *

I can not concur in an award of reparation to a party who admittedly was not injured or damaged.

I am authorized to say that Commissioners Esch, Lewis and Cox concur in this expression of dissent."

The Darnell-Taenzer Lumber Co. was one of a number of complainants in a proceeding before the Interstate Commerce Commission entitled *Burgess, et al. vs. Transcontinental Freight Bureau*, 13 I. C. C. 668, wherein the Commission had found that the rate charged on hardwood lumber from eastern points of production to the Pacific coast had been unreasonable and awarded reparation to the complainants. Complainants, Darnell-Taenzer Co. and several others who had been awarded such reparation were the *consignors* of the lumber, and it appeared that they had sold *f. o. b. destination.* The consignees paid the freight charges on delivery and *deducted those charges* in making settlement with the shipper for the lumber, the Commission holding that although the consignees had *physically* paid the charges, they having deducted the same in making settlement with the shippers, the *shippers* (consignors) *had actually borne the freight charges as such and were entitled to the award of reparation.*

The defendants refused to pay said award on the ground that although the complainants (consignors) had actually paid and *borne* the freight charges as such they had not been injured inasmuch as they had passed those charges on to the *consumer in the price for their lumber.*

Suit was brought in the Circuit Court, W. D. Tenn. to enforce said award. The demurrer to the declaration was sustained (190 Fed. 659). On appeal, the Circuit Court of Appeals reversed the judgment of said court and remanded the case for a new trial, 221 Fed. 890, saying page 895:

"As the record stood, taking into account the *prima facie* effect of the Commission's findings and orders and the testimony adduced on the trial, the *plaintiffs* (con-

signors) *were entitled to a direction of verdict in their favor* for the amount of the alleged excessive freights, provided the jury should find the rates in effect unreasonable and excessive." (Italics ours).

In reply to the carriers' contention (same as raised in the *Burgess* case) that the consumer alone was damaged by the payment of the excessive freight charges, said court (page 892) quotes the following from the opinion of the Commission in *Nicola, etc. vs. L. & N. Ry. Co.*, 14 Interst. Com. Com'n Rep. 199, 208:

> "The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the

same were paid, and who were the true owners of the property transported during the period of transportation."

Also quotes from what the Commission said in its first report in the *Burgess* case (13 Interst. Com. Com'n at page 680):

> "If complainants were obliged to follow every transaction to its ultimate result. and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

Upon a new trial in the District Court as directed by the Court of Appeals, the jury were instructed that if they found the rate charged unreasonable and that prescribed by the Interstate Commerce Commission reasonable, they should find for the plaintiffs (consignors) in *accordance with the Commission's award.* The jury found for the plaintiffs and this judgment was *affirmed* by the Circuit Court of Appeals, 229 Fed. 1022.

Upon appeal to this Honorable Court the aforesaid judgment *was affirmed*, thus upholding the decision of the Commission in the original case to the effect that although the consignee may have *physically paid the freight charges*, yet, if he deducts the same in settlement with the consignor, he, the consignor, is the person who actually bears said charges and is the party injured and is entitled to the award of reparation. The fact that the judgment in the *Darnell-Taenzer* case was *affirmed by the Supreme Court* in 245 U. S. 531 finally disposes of the question as to whom the award of reparation should be made under facts similar to above.

We think the correct interpretation of the opinion of the Supreme Court in the *Darnell-Taenzer* case is well stated by the District Court in the case at bar, page 83, 39 Fed. (2d) viz.:

"As this court interprets the *Darnell-Taenzer* case, it simply holds that the court, in a suit on a reparation award, will not inquire into the commercial effect of the payment of an illegal freight rate. What the court refers to, in the *Darnell-Taenzer* case, is the economic incidence of the payment of the excessive charge. Who, in an economic sense, ultimately bears the payment, is a matter into which the court will not inquire. The economic bearer of the burden, be he purchaser or consumer, is not a proper party plaintiff. Neither can the defendant absolve itself from the payment of damages because, in an economic sense, the plaintiff might add the excess price to his product and itself impose the burden or injury upon the consumer." (R. 71).

Why the Commission should have reversed a long line of its decisions holding that the party entitled to reparation was he who *bore* the freight charges, is incomprehensible, because in the *Darnell* (*Burgess*) case, the Commission itself had awarded reparation to the shipper, *although the freight charges had been physically paid by the consignee,* and upon appeal to this Honorable Court, it *affirmed* said holding, hence, the Commission's opinion in the *Portland Cement* case is not only in conflict with its own opinion in the *Darnell-Taenzer* case, but it is directly contrary to the decision of this court in that case.

Should there be any doubt remaining as to the proper construction of the opinion of this court in the *Darnell-Taenzer* case, we think it is foreclosed by the opinion of this court in the case of *Louisville & Nashville Railroad Co. vs. Sloss-Sheffield Steel and Iron Co.*, 269 U. S. 217-236.

In that case, the Commission in 60 I. C. C. 595, awarded reparation to the Sloss-Sheffield Company, the shipper, *although the freight charges had been physically paid by the consignee.* The reason stated by the Commission being, because the shipper had actually paid and *borne* the charges. Upon appeal, this court *affirmed* this holding.

In that case the plaintiff was the consignor of the shipments on which it was awarded reparation. The shipments were sold at a delivered price *f. o. b. destination.* The purchaser—consignee—paid the freight bill upon delivery of the shipments and remitted to the plaintiff the amount of the purchase price, less the freight charges. In that case, the Court of Appeals for the Fifth Circuit, said (295 Fed. 57-58):

> "The freight charge cannot well be regarded as paid or borne by a consignee when the payment is made with money to which the consignor is entitled; and in pursuance of a contract obligation of the consignee to the consignor. As the freight was paid by the consignor's debtor, who thereby, pursuant to contract, reduced his debt by the amount of the freight, such payment is to be considered as originally made by the consignor."

This court said:

> "All the shipments were made under a standard form of contract which was aplicable to sales for future delivery in installments and which contained a provision substantially as follows:
>
> > 'Price. Fourteen dollars and eighty-five cents ($14.85) per ton of 2,240 pounds delivered at Chicago, Illinois.
> >
> > This price is based on present tariff freight rate of $4.35 per ton. In case the tariff rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance. * * *'"
>
> "The provision in question is a common one in contracts of sale. Its effect upon the consignor's right to recover overcharges was carefully considered by the Commission in 1911 in *Baker Mfg. Co. vs. Chicago & North Western Ry. Co.*, 21 Interst. Com. Com'n R. 605. It was then held that the consignor must sue if goods were sold f. o. b. destination. This case has been con-

sistently followed by the Commission since, and it was cited in *Southern Pacific Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 584, 38 S. Ct. 186, 62 L. Ed. 451. In the case at bar, both the consignor and the consignees claimed reparation; and the Commission's decision denying relief to the consignees seems to have been acquiesced in before that tribunal by all parties. * * *"

"On goods sold f. o. b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. Moreover, the burden of the published freight rate rested upon the consignor under the bill of lading, *Louisville & Nashville R. R. Co. vs. Central Iron & Coal Co.*, 265 U. S. 59, 67, 44 S. Ct. 441, 68 L. Ed. 900, as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller."

In this connection, attention is called to the footnote on page 236 of said opinion referring to a large number of decisions by the Commission, in all of which it had held that the person *actually bearing* the freight charges, was the party entitled to the award of reparation. In said note no reference whatever is made to the Commission's opinion in the *Portland Cement* case.

In *Illinois Central R. Co. vs. Vest, et al.*, on plaintiffs' motion for a temporary injunction against enforcement of an order of the Railroad Commission of Ky., 39 Fed. (2d) 658, the court on page 660 says:

"The rule is that, where a shipper pays a rate held to be unreasonable, he may recover the excess and need only show that he paid and *bore* the charges, and neither the Commission nor the court will inquire whether, in the course of his business, he recouped his losses or passed them on to others. This was held in *Southern Pacific Co. vs. Darnell Lumber Co.*, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, and reaffirmed in *L. & N. R. Co.*

vs. Sloss-Sheffield Co., 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242. The questions of counsel for the railroad company to which objections were sustained dealt with the subject of passing the charges on to others, which, under these authorities, was not open."

We respectfully submit that the Commission misapprehended the significance of the decisions in the *Darnell-Taenzer* and the *Sloss-Sheffield* cases, and as the decision in the *Missouri Portland Cement* case is in conflict with said decisions the ruling of the District Court should be affirmed.

That the majority of the Commission still adheres to its decision in the *Missouri Portland Cement* case, *supra*, is shown in its comparatively recent decision in *General Grinding Wheel Corp. vs. Southern Ry. Co., et al.*, decided subsequent to the District Court's decision in the case at bar, 169 I. C. C. 83-91 (decided November 4, 1930). In that case complaint had been made to the Commission in regard to certain rates on abrasive grains and the Commission had found the rates charged to have been unreasonable and for the future established rates deemed reasonable and awarded complainant a certain sum as reparation on the past shipments. The Commission on page 83 says:

> "Briefly, the record shows that complainant, as consignee, paid the freight charges on these shipments in the first instance; that the consignor, under the terms of an agreement of sale, equalized the rate on abrasive grains from Niagara Falls, N. Y. to Philadelphia, which, during the period of movement, was 32 cents; and that complainant charged back 67 cents per 100 pounds to the consignor and bore the remainder, or 32 cents. On hearing, defendants did not oppose an award of reparation to the proper party, but contended that under the circumstances stated, complainant is not lawfully entitled thereto.
>
> "In their petition defendants renew that contention and ask that the reparation order be vacated and set

aside, in view of the recent decision of the United States District Court for the Northern District of Illinois in case of *Adams vs. Director General*, 39 F. (2d) 80. In that case the freight charges on shipments of live stock to Chicago were paid by the consignees, commissionmen at that point. The court said that while the manual operation of paying the freight was through the instrumentality of the commissionman, he was using the money of the shipper and not his own money; that the commissionman was an agent, and in making the payments, he made them out of the funds of the farmers and shippers; that the plaintiffs, commissionmen, had no legal interest in the proceedings; that they had adopted themselves as convenient agents to secure recovery, and that they were not the ones who had been damaged by the imposition and collection of the excessive charge. The court held that the persons whose rights had been violated and whose money the defendants illegally retained were the farmers, producers, and shippers and not the commissionmen, and that the plaintiffs could not maintain the action."

The Commission further says:

"The facts in the present case are similar to those considered in *Consolidated Cut Stone Co. vs. A. T. & S. F. Ry. Co.*, 39 F. (2d) 661, in which our award of reparation was upheld by the United States District Court for the Northern District of Oklahoma."

Four of the Commissioners dissented from this opinion, and Commissioner Mahaffie, page 86, said:

"I concur in the conclusion here because of the desirability of consistency in our reports and because of the apparent conflict in the decisions of the district courts cited in the majority report."

Commissioner Lewis, dissenting, said:

"Since the decision in *Missouri Portland Cement Co. vs. Director General*, 88 I. C. C. 492, in which I dissented, I have in several cases, although with a mental reserva-

tion, voted for reports which followed the doctrine therein laid down as the conclusion of the majority of the commission and therefore the decision of the commission. Inasmuch, however, as the question is here raised anew, I again record my dissent."

He further stated:

"I am aware that the decision of the district court in *Adams vs. Mellon* is not binding upon us, as would be the case if it were a decision of the Supreme Court of the United States, but in my judgment it embodies so correct an exposition of the law upon the point in question that we should now adopt and follow it."

"I also concur in Commissioner Lee's dissenting expression."

Porter, Commissioner, dissenting, page 87, said:

"I concur generally in all that is said in the dissenting expression of Commissioner Lee. When this case was before the division, I felt constrained to follow the doctrine of the *Missouri Portland Cement* case, as the accepted rule of this commission. In some cases I have heretofore voiced my disapproval of that doctrine."

Lee, Commissioner, dissenting, page 88-91, after quoting Section 8 of the Interstate Commerce Act, says:

"Complainant's right to reparation for the collection of an unreasonable rate, therefore, hinges on whether it has been 'damaged' within the meaning of the act.

"The Supreme Court has declared that the liability of a carrier in charging an unreasonable rate 'arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier.' *Louisville & Nashville R. R. Co. vs. Sloss-Sheffield Co.*, 269 U. S. 217, 232.

"Our decision in the *Missouri Portland Cement* case was based wholly on the then recent decision of the Su-

preme Court in *Southern Pacific Co. vs. Darnell-Taenzer Co.*, 245 U. S. 531, and, in reaching the conclusion above set forth (in the *Missouri Portland Cement* case) we reversed a long line of decisions wherein we had required proof of the bearing of the freight charges by a complainant as an essential prerequisite to the recovery of an award of reparation."

On page 90, the Commissioner continues:

"The opinion of the court in *Louisville & Nashville R. Co. vs. Sloss-Sheffield Co., supra,* rendered subsequent to our decision in the *Missouri Portland Cement* case, only serves to emphasize our misconception of the 'reasoning employed by the court' in the *Darnell-Taenzer* case."

Page 91:

"In view of these circumstances, for the majority to continue to accept as correct the holding in the *Missouri Portland Cement* case and to award reparation to the complainant in the instant case, who admittedly did not bear the unreasonable portion of the charges, who has not sustained the slightest damage, and who is not 'entitled to' the award, is a novel, if not unusual, conception of the law.

"I am authorized to state that Commissioner Tate concurs in this dissent."

The majority refers to the decision of the District Court, N. D. Oklahoma, in *Consolidated Cut Stone Company vs. A. T. & S. F. Ry. Co.*, 39 Fed. (2d) 661 as being in conflict with the decision of the District Court in the case at bar. We are unable to see any conflict. The district Court in the case at bar held that the plaintiffs could not recover because they had not *borne* the charges, whereas in the *Consolidated Cut Stone* case both the Commission and the court found that the plaintiffs had *borne* the charges in question,

and, therefore, were lawfully entitled to recover reparation. The opinion of the Commission is reported in 113 I. C. C. 480, and on page 485 it says:

> "We find * * * that complainants made the shipments as described and paid and *bore* the charges thereon at the rates herein found unreasonable; that they have been damaged in the amount of the difference between the charges paid and those that would have accrued at the rates herein found reasonable; and that they are entitled to reparation with interest."

The award, therefore, in this case was in conformity with the decisions of the Commission prior to its decision in the *Missouri Portland Cement* case. The District Court *approved the findings of the Commission that plaintiffs had borne* the charges found to have been unreasonable. The question, therefore, of whether those plaintiffs could have recovered had the findings been that they had *not borne* the freight charges was not determined. The issue presented to the District Court in the case at bar was not present in the *Consolidated Cut Stone* case.

Brief Filed on Behalf of the Interstate Commerce Commission as Amicus Curiae.

Throughout a good portion of that brief it is assumed that the plaintiffs were awarded reparation "as factors", but as we have shown, this is not a fact. The plaintiffs were awarded reparation in their own right, and, therefore, a discussion of their right to maintain this suit in the representative capacity as factors is not in issue.

However, even if complaint had been made to the Commission as factors, they would not under the decision of the Commission in *Crutchfield & Woolfolk vs. Sou. Pac. Co.*, 24 I. C. C. 679 have been entitled to recover. In this case the Commission said:

"We have held that where a commission merchant who pays the freight in the first instance has settled with his principal who, by the terms of that settlement has paid the freight charges, such commission merchant has no further interest in the transaction, and is not a proper party to maintain a proceeding for the recovery of reparation. But it must appear that the account has been closed, that the freight has been in fact paid by the principal and that the interest of the commission merchant has been extinguished." *G. F. Hinrichs vs. Wells Fargo Co.*, 53 I. C. C. 362, 364.

In referring to the right of the plaintiffs to recover reparation under the provisions of the Interstate Commerce Act as factors (although not in issue in the case) the District Court quoted an opinion of the late Judge Sanborn of the Eighth Circuit rendered in a receivership proceeding in the District Court for the Eastern Division of the Eastern District of Missouri in the case of *North American Co. vs. St. Louis and San Francisco R. R. Co.* (Appendix 133). In his opinion, Judge Sanborn says:

"The interveners, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged, the Commission so held, and there is substantial—nay, conclusive evidence that the factors did not, and that the country growers and shippers did suffer and bear the substantial damages. Notwithstanding this fact and notwithstanding the fact that the Commission itself reported and found that the factors in their representative capacity were entitled to the reparation. Its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference in that order to their representative capacity."

Judge Sanborn further says:

"The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and

bear the damages the court is not persuaded that they have either the property rights in the claims for damages or the authority to release or assign them. While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet, when such a transaction is completed, without more, the property right of the shipper in the claim for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists."

In referring to the reasons given by the Commission authorizing the granting of reparation to the complainants as factors—which award as we have shown was not made—the Commission based its authority so to do on the statement that "defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants". The District Court said:

"This contention cannot be maintained. The right to maintain a suit is that given by the statute to 'the person or persons injured'. The right, therefore, to maintain a suit is given by law. Any act, practice or custom either of the Chicago Live Stock Exchange, the commissionman, or of the carriers could not confer the right to maintain the suit."

In its brief, pages 4-5, the Commission says that it held "that the services of loading and unloading are *part of the transportation* of live stock; and that the collection of *separate charges* from the shippers for loading and unloading *in addition to the line-haul rates* was an unlawful and unreasonable practice." (Italics ours.)

As we have heretofore shown, the through transportation rate was made up of the trunk line rates to the connection

of their rails with the rails of the Junction Railway, plus the trackage charge of $2.00 per car, and the published rate of the Stock Yard Company. The through transportation rate was, therefore, a combination of these separate rates. The Stock Yard Co. completed the transportation by driving the live stock from the cars, across the platforms and through the yards into their appropriate pens, there to await delivery.

That the Commission recognized that the charge of the Stock Yard Co. constituted a part of the through rate is seen from the following quotation from its brief, pages 6-7, "Nor did the Commission find that the apprehensions of the line-haul carriers that the Stock Yard Co. might make any charge it pleased which the line-haul carriers would be required to pay, were well founded for the reasons that"

> "Upon their complaint or upon the complaint of any party, we can examine any of the charges that make up the *sum of the through charges*, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and the divisions thereof, or otherwise as the facts may warrant." (Italics ours.)

The Commission thus recognized that the charge of the Stock Yard Co. constituted a part of the *through* rate, and, therefore, could not be an additional charge to the transportation charge, and hence its basis for holding said charge to be an unlawful practice is incorrect and the order awarding reparation is not justified.

The invalidity of the order of the Commission for the foregoing reasons was set forth with other grounds in the motion of the Director General in the District Court for a directed verdict, viz.:

(1) "The evidence is insufficient to support or sustain the order of the Interstate Commerce Commission sued on in this case." (R. 47).

(3) "The evidence in this case shows that the Union Stock Yard & Transit Co. was, during all of the time complained of in this suit, a common carrier, and that it received the live stock, for the unloading of which the charges in controversy were assessed, and collected from the railroads being operated by the Director General of Railroads, under Federal control, as a connecting carrier; that it unloaded such live stock as such connecting carrier and delivered same after unloading to the consignees entitled to receive the same; that the charge collected for such unloading was provided for in its tariff on file with the Interstate Commerce Commission, and the said Union Stock Yard and Transit Co. collected said charges and received the benefits thereof." (R. 48).

Another ground urged by the Commission to sustain the award to petitioners in their own right is, as we understand it, because a consignee may upon acceptance of a delivery of freight be held liable for freight charges he should, therefore, have the reciprocal right to recover reparation under the Interstate Commerce Act. It is a sufficient answer to this argument to say that the right to recover reparation is a statutory right under the said Commerce Act, and the conditions granting such right must be fully complied with, i. e. the party must show that he and not some one else has suffered a pecuniary loss arising out of the violation complained of.

There is no contractual relationship between the carrier and consignee by the mere designation of the latter as consignee. The consignee's liability for freight charges does not depend on any duty devolving upon him as consignee, but because of an implied agreement to pay the lawful tariff charges created by his acceptance of the goods. If the goods are refused there is no privity with the carrier that will entitle it to sue the consignee for the freight charges.

There is no undisclosed principal in a transportation contract for the only parties to the contract are those named in the bill of lading.

As was said by this court in the *Darnell-Taenzer* decision, *supra:*

> "If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer, who in turn paid an increased price. He has no privity with the carrier."

The purchaser referred to in this excerpt was, under the facts of the *Darnell-Taenzer* case, the consignee, who as in the instant case had paid the freight charges and in turn had deducted a similar amount from the invoice price.

The chief ground on which the Commission overruled its many former opinions to the effect that the party entitled to recover was he who actually suffered the loss—bore the freight charges—appears to be based on its construction of the following language of this court in the *Darnell-Taenzer* case, viz.:

> "The general tendency of the law, in regard to damages at least, *is not to go beyond the first step;* that 'plaintiffs suffered losses to the amount of the verdict *when they paid*', and that 'their claim *accrued at once* in the theory of the law and it *does not inquire into later events.*'." *Missouri Portland Cement* case, 88 I. C. C. 495 (Italics by Commission).

The misconstruction by the Commission of the meaning of the language "the plaintiffs suffered losses when they paid the charges" could not have had reference to the mere physical act of passing the money to the carriers because the plaintiffs, consignors, under the facts in that case did not do so,

the physical payment having been made by the consignees—the first step having thus been taken by the consignees and not by the consignors to whom the award was made.

XI.

NO QUESTION OF PUBLIC IMPORTANCE OR OTHER QUESTION JUSTIFYING THE GRANTING OF A WRIT OF CERTIORARI IS PRESENTED, AND IT MUST NOW APPEAR THAT THE WRIT IN THIS CASE WAS IMPROVIDENTLY GRANTED AND SHOULD BE DISMISSED.

The only ground of affirmance of the judgment of the District Court was that the Yard Company was a common carrier engaged in interstate commerce; that it was required to file tariffs of its charges and to enforce the same, and having done so, the collection of its charges was not unlawful and could not furnish any basis for a recovery on the part of petitioners. Petitioners do not contend the law applicable to such a situation is not as held by the Circuit Court of Appeals. They do contend, however, that the tariffs of the line-haul carriers and the rates contained therein covered the entire transportation, including the unloading at the Yards; that the Yard Company, in performing its common carrier service of unloading, was the agent of the line-haul carriers, and that its tariffs were filed pursuant to such agency and that the Court, in reaching and announcing its conclusion, usurped the function of the Commission. We have shown herein that neither contention of petitioners is tenable.

The questions presented by petitioners and on which the writ of certiorari was granted are thus seen to not be involved in this suit, and not being involved herein, are not subject to be reviewed or decided by this Court. The ques-

tion as to whether the petitioners had such interest as would permit them to maintain the suit if otherwise maintainable, was not determined by the Circuit Court of Appeals, the deciding of such question not being necessary to an affirmance of the judgment. We do not understand this Court will review a question decided by the District Court in a case where the questions decided by the Circuit Court of Appeals do not of themselves furnish the basis for granting writ of certiorari.

If we are right in such understanding, then the writ in this case was improvidently granted, and when such fact is made to appear in any stage of the proceedings, the writ will be dismissed.

Such a case was *Layne & Co. vs. Western Well Works, Inc., et al.*, 261 U. S. 387-393. In that case after submission on the merits, it was discovered that the writ was improvidently granted, and the writ was accordingly dismissed. On page 393 the Court said:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.
>
> "Precedents for dismissing a writ of certiorari improvidently granted are found in *Furness, Withy & Co. vs. Yang-Tsze Insurance Association*, 242 U. S. 430, and in *United States vs. Rimer*, 220 U. S. 547.
>
> Writ of certiorari dismissed."

The same thought is expressed in *Magnum Import Co. vs. Coty*, 262 U. S. 159-163, where it is said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes; first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

Certainly the purpose of a writ of certiorari is not the determination of questions which are not presented when the real facts of the case are considered. It would be idle for this Court to determine what the rights of the parties might be if the Yard Company was, in fact, the agent of the line-haul carriers when the evidence shows such agency did not exist. It would be idle to determine the question of what the rights would be in the event the line-haul carriers' tariffs and charges covered the unloading of the live stock, where it appears in the evidence conclusively that the tariffs did not cover the unloading, either in the transportation or in the charges for the transportation furnished. It would be idle to determine whether the Court can usurp the functions of the Commission when the record conclusively shows there was no such usurpation.

That a Court may not set aside the act of the Commission where administrative discretion is involved, is conceded. The Courts have repeatedly so held and there is now no conflict on such question.

In conclusion, we respectfully urge that the writ of certiorari was, for the reasons hereinbefore set forth, improvidently granted, and should be dismissed. If, however, the Court is of opinion it may properly review the decision of the

Circuit Court of Appeals, then we urge that, for the reasons presented, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

Act to Regulate Commerce, Section 1, Paragraph 6.

(6) *Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Act to Regulate Commerce, Section 6, Paragraph 1.

(1) *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all

privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

Act to Regulate Commerce, Section 6, Paragraph 4.

(4) *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Act to Regulate Commerce, Section 6, Paragraph 7.

(7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passsengers or property, except such as are specified in such tariffs.

Act to Regulate Commerce, Section 8.

Liability in damages to persons injured by violation of law. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Act to Regulate Commerce, Section 15, Paragraph 5.

(5) *Transportation of livestock in carload lots; services included.* Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards shall include all necessary service of unloading and reloading en route, delivery at public stock yards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards.

Transportation Act 1920, Section 206 (c), Section 74, Paragraph (c).

(c) *Complaints for reparation; jurisdiction to hear.* Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreason-

ably prejudicial, or otherwise in violation of chapter 1 of this title, may be filed with the commission within one year, or, if so claimed in respect of overcharges above the legal tariff charge, within two years and six months, after February 29, 1920, against the agent designated by the President, under subdivision (a) of this section, naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under the Federal control at the time the matter complained of took place. The commission is given jurisdiction to hear and decide such complaints in the manner provided in chapter I of this title, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a) of this section.

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

NORTH AMERICAN COMPANY, Complainant,	)	
vs.	)	In Equity.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, ET AL., Defendants.	)	No. 4174.

IN THE MATTER OF THE INTERVENTION OF SBSTON, WYNNE & COMPANY, ET AL., FACTORS.

MEMORANDUM.

SANBORN, Circuit Judge:

The final decree in the main suit above entitled, which was rendered in August 1916, required the purchaser at the foreclosure sale to assume and pay as a part of the consideration for its purchase of the property of the mortgagor railroad company, the debts and liabilities of the receivers. At the time of the purchase by the St. Louis-San Francisco Railway Company at the foreclosure sale under the decree of the property of the mortgagor railroad company the receivers were liable to about 3500 country growers and shippers for damages sustained by them from the collection by the receivers of about $25,000 of overcharges for freight on cotton shipped by them to Memphis, Tennessee, the payment of which

was assumed by the defendant. About thirty of the factors doing business in Memphis who received, paid the freight upon, sold, and after deducting the freight charges they paid including the overcharges and their commissions, remitted the balance to their principals, have intervened in this foreclosure suit and now ask a decree of this court that the defendant pay to them this $25,000 and interest.

The overcharges were collected by the receivers and the cotton was shipped to and sold by the factors between May 27, 1913 and December 27, 1914. When these overcharges were collected they were parts of rates lawfully in force and the overcharges were subsequently held to be unreasonable by the Interstate Commerce Commission. When the receivers learned that these overcharges were deemed unreasonable they applied informally to the Commission for permission and authority to them to pay back to the shippers the amounts collected on account of these overcharges, but the Commission refused them permission so to do. This proceeding on the informal application was pending before the Commission from May 1915 until March 11, 1916, when it finally decided that the allowance of the refunds to the shippers should not be allowed in this informal way, and gave notice that if a formal complaint was to be filed it must be presented to the Commission within six months from March 11, 1916. Within the six months, on September 2, 1916, a formal complaint was filed praying a finding and order that the tariff under which the overcharges were collected was unreasonably high and that the complainants were entitled to collect the refunds. This formal complaint contained in its title the name "Memphis Freight Bureau, on behalf of the following persons, firms and corporations, all doing business in Memphis, Tennessee" and the names of about forty factors as complainants. The first averment in this complaint was:

"That the Memphis Freight Bureau is a corporation chartered under the laws of the State of Tennessee for the purpose of protecting the merchants, manufacturers and shippers of Memphis and vicinity in the matter of freight rates. It brings this petition for the use and on behalf of the persons, firms and corporations named in the caption, who are all engaged in the cotton business at Memphis, Tenn., and who are the factors, agents and representatives of a great number of growers of and dealers in cotton who are too numerous and too widely scattered to be named as petitioners herein.

For many years these dealers and growers of cotton scattered all over the cotton growing territory adjacent to Memphis, have been shipping cotton to the persons named in the caption, for the purpose of having same sold and proceeds credited to said growers and shippers".

This allegation was followed by others alleging the unreasonableness of the rate, and setting forth the claims of the complainants to collect the overcharges for their principals—the 3500 growers and shippers, but it did not contain the names of the latter. The defendant railway company answered, testimony was taken, and the commission on May 18, 1918 held that the overcharges were unreasonable, that the country growers and shippers had suffered the damages and borne the loss occasioned by the collection thereof, and that the factors had not, and that the growers and shippers were not before it, and it refused to order the payment of the damages to the factors. 50 I. C. C. 345.

On August 10, 1918 the complainants filed a petition for rehearing and for leave to amend their complaint by making the country growers and shippers parties as complainants, and in January 1919 the Commission ordered the case reopened and that the complainants' petition "For Leave to amend complaint * * * by making parties complainant the original consignors, the country growers and shippers, who, the Commission found, paid the charges and suffered the damages, be and the same is hereby granted". No amendment to the petition pursuant to that order and no evidence of any notice to the original consignors of this order has been called to the attention of the court, but in its subsequent report of January 5, 1920, 57 I. C. C. 212, the Commission declared that "some 3500 country growers and shippers were made complainants". In that report the Commission wrote: "They (the factors) point out that, without specific instructions from the many hundreds of individual growers who shipped the cotton to them for sale, it is their duty and custom, as factors, to pay the freight charges, and to file claims and suits for loss and damages and excess freight charges in connection with shipments of cotton. They testify that this custom is not only recognized by the growers and factors themselves, but by the railroads who settle with the factors for claims and suits". The Commission further held that the claims of the growers and shippers were saved from the bar of limitation by the filing of their claims "Within the statutory period in the names of the factors" and wrote: "We have

found that the tariff provisions and regulations were unjust and unreasonable to the extent previously stated herein. We further find that the country growers and shippers made the shipments involved, and paid and bore the charges thereon through the complainant factors; that they have been damaged to the extent of the difference between the charges paid and those herein found reasonable, and that the complainant factors, in their representative capacity, are entitled to the reparation with interest, on shipments made subsequent to May 27, 1913, provided such shipments were covered by claims presented to us within the statutory period."

The intervening petition of the factors in this court was answered by the defendant. Much evidence was introduced and briefs and arguments have been presented and considered by the court.

This is a proceeding in equity. It is an appeal to the conscience of the chancellor to require the defendant to pay to those entitled to receive it this $25,000 and interest which the receivers owed to the latter when the intervenor purchased the property. No one denies that in justice and equity the consignors, the country growers and shippers, ought to receive this reparation and there can be no doubt that unless there is some insuperable rule of law of equity that forbids it, a court of equity ought to direct its payment by the defendant which assumed the original liability of the receivers to make such payment.

Thoughtful consideration of the defendant's objections to such payment has convinced that it ought not to be withheld on account of any of them except that the factors did not suffer the damages, and that the claims of the consignors and factors are barred.

The intervenors, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged, the Commission so held, and there is substantial—nay, conclusive evidence that the factors did not, and that the country growers and shippers did suffer and bear the substantial damages. Notwithstanding this fact and notwithstanding the fact that the Commission itself reported and found that the factors in their representative capacity were entitled to the reparation. Its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference in that order to their representative capacity.

There was substantial evidence before the Commission

and there is substantial evidence in this suit that it was and is the established practice and custom of factors at Memphis receiving and selling cotton shipped to them from their customers in the surrounding country to present and prosecute the claims of the latter for overcharges thereon and damages thereto by the railroad companies, and no evidence to the contrary is called to the attention of the court. In this state of the case the court is of the opinion that the complaint of the Memphis Freight Bureau and the factors was a sufficient presentation to the Commission of the claims of the country growers and shippers to prevent the bar of any limitation prescribed by any act of Congress or rule of the Commission, and the Memphis Freight Bureau and the factors were sufficiently empowered by the country growers and shippers to make this presentation. *Spiller vs. A. T. & S. F. Ry.*, 253 U. S. 117, 122, 124, 125. The object of rules and statutes of limitations is to compel notice to the defendant of claims to be prosecuted against him so that he may not lose the evidence he may have in defense of them and a full opportunity to prepare that defense. The evidence is conclusive that the receivers and the defendant had not only notice but absolute knowledge of these claims of the growers and shippers and of their equitable nature from early in the year 1915. The same men acted as officers of the Traffic Department of the defendant after the foreclosure sale that acted for the receivers before it.

The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and bear the damages the court is not persuaded that they have either the property rights in the claims for damages or the authority to release or assign them. While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet, when such a transaction is completed, without more, the property right of the shipper in the claim for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists. *Sloss Sheffield-Iron Company et al. vs. Louisville & Nashville R. R. Co.*, 40 I. C. C. 738, 740; *Hygienic Ice Co. vs. Chicago & North Western Ry. Co.*, 37 I. C. C. 384; *Oden & Elliott vs. Seaboard*

Air Line Ry. Co., 37 I. C. C. 345. Many years have passed since the shipments and sales were made whence the rights of these parties arose, and upon payment of this reparation or any part of it the defendant is entitled to a release and satisfaction of the claim to it by him who has the right of property in that claim. In the opinion of the court the release and satisfaction by the factors of their claim to this reparation or to any part of it would not justify the court in requiring the defendant to pay it to them, unless such release and satisfaction was accompanied by releases and satisfactions or their equivalents of that claim by the country growers and shippers who suffered and bore the damages from which the claim sprang. Upon the presentation to the court of such releases and satisfactions executed by the original consignor or their equivalents a subsequent application for an order of payment by the defendant may be made.

Endorsed
Filed June 17, 1922.
Jas. J. O'Connor, Clerk.

CERTIFIED COPY. D. C. Form No. 30.

UNITED STATES OF AMERICA)
) SS.
Eastern District of Missouri)

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum, filed June 17th, 1922. now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Mo., this 29th day of November, A. D. 1929.

JAS J. O'CONNOR, *Clerk.*
By RUTH COLLINS, *Deputy Clerk.*